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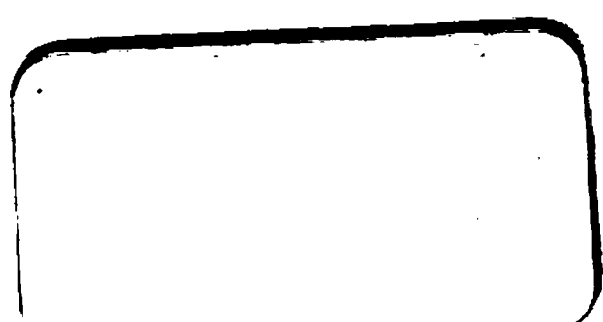
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**ESTEE'S**  
**PLEADINGS, PRACTICE,**  
**AND FORMS,**  
**ADAPTED TO**  
**ACTIONS AND SPECIAL PROCEEDINGS**  
**UNDER**  
**CODES OF CIVIL PROCEDURE.**

**BY**  
**MORRIS M. ESTEE,**  
**COUNSELOR-AT-LAW.**

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**ESTEE'S**  
**PLEADINGS, PRACTICE**  
**AND FORMS.**





## PART SEVENTH.

(Continued.)

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### CHAPTER IV.

#### INJUNCTION.

§ 4224. **Definition of.** A writ of injunction is defined as a judicial process, operating *in personam*, and requiring the person to whom it is directed to do or refrain from doing a particular thing.<sup>1</sup> Section 525 of the California Code of Civil Procedure defines an injunction to be a writ or order requiring a person to refrain from a particular act. This definition given by the Code, however, is intended to apply only to preliminary or interlocutory injunctions, and does not limit the power of the court to decree or order, as the final relief, or part of it, that the party shall do a particular thing, as that he execute a deed, or the like. In New York mandatory injunctions are not granted under the provisional remedies of the Code.<sup>2</sup> But they are proper as part of the final relief.<sup>3</sup> The primary classification of injunctions may, therefore, be into mandatory and prohibitory. A prohibitory injunction is purely a preventive remedy; if the injury be already done, the writ can not correct the injury so inflicted; it is not a punishment for past wrongs, but a restraint against the commission of future injuries. This writ is intended to require all parties to leave things just as they were at the time of the issuance of it. It will stay waste, yet it will not change the possession of the property; it will protect a party against future injury, yet it will not settle the question of title or the rights of the parties.

§ 4225. **Duration of writ.** With reference to duration, injunctions are divided into preliminary or interlocutory and

<sup>1</sup> High on Injunctions, p. 2; see, also, *Wangelin v. Goe*, 50 Ill. 459. The later tendency of the courts is to enlarge the scope of the writ of injunction whenever it is necessary to protect an owner in the beneficial use and enjoyment of his property. *Sankey v. St. Mary's Academy*, 8 Mont. 265; and see *Lee v. Watson*, 15 id. 234. "Injunction" and "restraining order" are substantially synonymous. *State v. Lichtenberg*, 4 Wash. 407.

<sup>2</sup> *Ware v. Kelsey*, 14 Abb. Pr. 105.

<sup>3</sup> *People v. Vanderbilt*, 25 How. Pr. 139; see *Wheelock v. Noonan*, 108 N. Y. 179; 2 Am. St. Rep. 405.

perpetual. The first are such as are issued upon filing the bill or complaint, or at any time before the final hearing, and which are to continue until the answer is filed, or until the further order of the court, or until the final hearing. A perpetual injunction is granted only at or after a final hearing upon the merits, and may be the sole object of the suit, or be incidental to or in aid of other relief granted by the decree.

§ 4226. **Interlocutory injunction.** The sole object of an interlocutory injunction is to preserve the subject in controversy in its then condition, and, without determining any question of right, merely to prevent the further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered.<sup>4</sup> It can not be used to undo what has already been done, nor to take property out of the possession of one party and put it in the possession of the other.<sup>5</sup> It will not ordinarily be granted where the parties are in dispute concerning their legal rights, until the right is established at law, unless to avoid injurious consequences which can not be repaired under any standard of compensation.<sup>6</sup> Where the parties are at issue upon a question of legal right, and it is necessary to preserve their respective rights *in statu quo* until the issue is decided, an interlocutory injunction may be properly allowed.<sup>7</sup>

§ 4227. **Form of injunction.** It is often said, in a general way, that the form of an injunction must always be in the negative; but if that be true, there can be no such thing as mandatory injunctions, or injunctions requiring the performance of an act. Such expressions are generally used in cases in which the court is asked for an injunction, requiring the defendant to do an act which can not properly be required by a court of equity, because the plaintiff has a remedy at law by the recovery of damages, if the defendant omit to do the act. In the case of *Lane v. Newdigate*, 10 Ves. 194, an injunction was asked, prohibiting certain acts, and also that defendant make certain repairs. Eldon, lord chancellor, expressed

<sup>4</sup> High on Injunctions, § 4.

<sup>5</sup> Id.; *Farmers, etc. v. Reno*, 53 Penn. St. 224.

<sup>6</sup> *Mammoth Vein Coal Co.'s Appeal*, 54 Penn. St. 183; *Gilroy's Appeal*, 100 Id. 5.

<sup>7</sup> *Harmen v. Jones*, 1 Cr. & Ph. 299; *Helm v. Gilroy*, 20 Oreg. 517; *Watts v. Foster*, 12 Oreg. 247.

a difficulty, "whether it is according to the practice of the court to decree or order repairs to be done." In that case, however, the difficulty was overcome by requiring the defendant to refrain from such things as were clearly within the power of the court to order, but which, in this particular case, involved the repairs as a matter of necessity, so that the prohibitory order could not well be observed without making the repairs. So in *Sanders v. Logan*, 2 Fisher's Pat. Cas. 170, the court say: "As a remedy, it should be used only for prevention or protection." But in that case the bill prayed for an injunction and an account; and the court held that the accounting would be improper, as the true measure of damages for the use or infringement of a patent was the value of a license, and that might be recovered at law, and that the remedy by injunction is neither necessary nor proper to enforce the payment of money.<sup>8</sup> The general rule doubtless is, that preliminary or interlocutory injunctions are prohibitory or preventive merely, and must, therefore, be negative in form. And it is also the general rule that such an injunction should not attempt to do indirectly that which it can not do directly.<sup>9</sup> No particular form is requisite. It is sufficient if the writ or order gives an authentic notification of the mandate of the court or judge.<sup>10</sup> The seal of the court is necessary to the writ.<sup>11</sup>

§ 4228. **By whom granted.** Independently of the statute, injunctions could only be granted by courts of equity, or a chancellor, or a master in chancery. By statute in the different states the power is granted to certain courts of inferior jurisdiction, court commissioners, and the like, to grant or issue temporary injunctions, but in all such cases the power is conferred and exercised as auxiliary to a court of general jurisdiction having equity powers. The effect of such an order made by a county judge is the same as if made by the District Court, and the injunction is subject to be controlled, modified, or dissolved by the district judge, the same as if issued by his order in the first instance.<sup>12</sup> A county judge has no power to grant an injunction in an action not triable within his county;

<sup>8</sup> *Sanders v. Logan*, 2 Fisher's Pat. Cas. 170.

<sup>9</sup> *Akrill v. Selden*, 1 Barb. 317; *Blakemore v. Glamorgan Canal*.

<sup>1</sup> *Myl. & K.* 183.

<sup>10</sup> *Summers v. Farish*, 10 Cal. 353.

<sup>11</sup> Cal. Code Civ. Pro., § 152. subd. 1.

<sup>12</sup> *Borland v. Thornton*, 12 Cal. 440.

and if he do, it is void, not voidable.<sup>13</sup> In California a writ or order of injunction may be granted by the court in which the action is brought, or by a judge thereof, or by a county judge; and when made by a judge, it may be enforced as an order of the court.<sup>14</sup> Court commissioners have no power to grant writs or orders of injunction in California.<sup>15</sup>

**§ 4229. When injunction lies.** The granting or dissolving an injunction rests in the sound discretion of the court, and on the justice and equity of each particular case.<sup>16</sup> The plaintiff's rights, in order to be protected by injunction, must be such as can be enforced in the court to which he applies;<sup>17</sup> and injunction will not be granted where the acts complained of are already accomplished.<sup>18</sup> The California statute gives three instances where the writ of injunction may issue, to-wit: 1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually.<sup>19</sup> 2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff;<sup>20</sup> so in aid of an action of trespass, where it appears that the injury will be irreparable and can not be compensated in damages;<sup>21</sup> an action will lie to enjoin a threatened trespass on land, where the trespass, if committed, would destroy the substance of the

<sup>13</sup> *Eddy v. Howlett*, 2 Code R. 76; *Chubbuck v. Morrison*, 6 How. Pr. 367.

<sup>14</sup> Cal. Code Civ. Pro., § 525.

<sup>15</sup> See Code Civ. Pro., § 259, subd. 1.

<sup>16</sup> *Tucker v. Carpenter*, Hempst. 440; *Nelson v. Robinson*, id. 464; *Blue Bird Min. Co. v. Murray*, 9 Mont. 468; *Telephone Co. v. Railroad Co.*, 121 N. Y. 397; *Logansport v. Uhl*, 99 Ind. 531; 49 Am. Rep. 109.

<sup>17</sup> *Rogers v. Mich. So. R. R.*, 28 Barb. 541; see, also, *Reubens v. Joel*, 13 N. Y. 492; overruling *Mott v. Dunn*, 10 How. Pr. 225; *Merritt v. Thompson*, 3 E. D. Smith, 295; *Pomeroy v. Leonard*, 5 How. Pr. 438.

<sup>18</sup> *Perkins v. Brown*, 6 How. Pr. 347, 348.

<sup>19</sup> Cal. Code Civ. Pro., § 526, subd. 1.

<sup>20</sup> Id., subd. 2.

<sup>21</sup> *Waldron v. Marsh*, 5 Cal. 119; but see *Erpstein v. Berg*, 18 How. Pr. 92.

land, which could not be specifically replaced.<sup>22</sup> 3. When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, an injunction may be granted.<sup>23</sup> But a careful reference to the decisions of our courts in cases arising under each of those subdivisions will be necessary to understand fully their meaning. The decisions of the highest court of California, as well as those of many other states in the Union, have been exhaustive upon the points arising under this and similar statutes.<sup>24</sup>

**§ 4230. When injunction will not be granted.** Injunctions are not granted except with great caution, and in cases where the right and necessity are clear;<sup>25</sup> and should not be granted in a matter merely pecuniary, where the probabilities are against the plaintiff's success upon the trial of the cause.<sup>26</sup> It may be advantageous to give some instances where the writ of injunction will not be granted. First, one court can not, by injunction, restrain the executions or orders of another court of equal and co-ordinate jurisdiction.<sup>27</sup> This is clearly the rule in California, and until recently, would seem to have been the rule everywhere. Some of the New York courts in New York city have deviated from this apparently well-settled principle

<sup>22</sup> *More v. Massini*, 32 Cal. 590, and authorities therein cited; also, *Smith v. Gardner*, 12 Oreg. 221; 53 Am. Rep. 842; *Fox v. Fitzsimmons*, 29 Hun, 574; *Lembeck v. Nye*, 47 Ohio St. 336; 21 Am. St. Rep. 828.

<sup>23</sup> Cal. Code Civ. Pro., § 526, subd. 3; N. Y. Code, § 604.

<sup>24</sup> See, also, Cal. Civ. Code, § 3422.

<sup>25</sup> *Roberts v. Matthews*, 18 Abb. Pr. 199; *Longshore Printing Co. v. Howell*, 26 Oreg. 527; *Varney v. Pope*, 60 Me. 192; *Amerman v. Deane*, 132 N. Y. 355; 28 Am. St. Rep. 584.

<sup>26</sup> *Fredericks v. Mayer*, 1 Bosw. 232; *Att'y-Gen. v. The Mayor, etc.*, 5 De Gex, M. & G. 52; *Richards v. N. W. Dutch Church*, 11 Abb. Pr. 35; see Cal. Civ. Code, § 3423.

<sup>27</sup> *Revalk v. Kraemer*, 8 Cal. 66; 68 Am. Dec. 304; *Uhlfelder v. Levy*, 9 Cal. 614; *Judson v. Porter*, 51 id. 562; *Wilson v. Baker*, 64 id. 475; *Grant v. Quick*, 5 Sandf. 612; *Platto v. Deuster*, 22 Wis. 482; *Crowley v. Davis*, 37 Cal. 269. The Superior Court can not enjoin the execution of a mandate of the Supreme Court. The order of the Supreme Court must control, and any conflicting order from the Superior Court must be disregarded. *Quan Wo Chung v. Lanmeister*, 83 Cal. 384.

of equity practice, as injunctions are now obtained in some of those courts in most instances where an action is brought. Whether this be the fault of the courts, the litigants, or attorneys, is a question which, doubtless, might require examination. But it is certain that the hasty and inconsiderate issuance of writs of injunction in doubtful cases is dangerous alike to the business interests of the country, the legal rights of parties, and the well-settled precedents of the courts. Nor can a state court enjoin the proceedings of a United States court.<sup>28</sup> Nor has any United States court jurisdiction to enjoin proceedings in a state court.<sup>29</sup> The general rule established by the decisions seems to be subject to three exceptions: 1. Where the proceedings in the subordinate tribunal will necessarily lead to a multiplicity of actions.<sup>30</sup> But not where there are only two actions for the same cause.<sup>31</sup> A bill to restrain vexatious litigation, upon the ground that the right to real property has been determined in former suits, must show that the title to the property was determined in a suit or suits in which all the claimants to the title were parties.<sup>32</sup> 2. Where they lead in their execution to the commission of irreparable injury to the freehold. 3. Where the claim of the adverse party is valid upon the face of the instrument, or the proceeding sought to be set aside, and extrinsic facts are necessary to be proved, in order to establish the invalidity or illegality. In such cases equity will interpose.<sup>33</sup>

An injunction will not be granted when there is a remedy at law. A party who has his remedy provided by law, but does not avail himself thereof, and fails to show wherein he is injured, is not entitled to relief in a court of chancery.<sup>34</sup> But it

<sup>28</sup> *Phelan v. Smith*, 8 Cal. 520; see, also, *McKim v. Voorhies*, 7 Cranch, 281; *Schuyler v. Pellissier*, 3 Edw. Ch. 193; *Mead v. Merritt*, 2 Paige, 404.

<sup>29</sup> *Diggs v. Wolcott*, 4 Cranch, 180.

<sup>30</sup> *N. Y. & N. H. R. R. Co. v. Schuyler*, 8 Abb. Pr. 241; S. C., 7 id. 69; S. C., 17 N. Y. 608; *Banks v. Van Antwerp*, 5 Abb. Pr. 410; *Heywood v. City of Buffalo*, 14 N. Y. 541.

<sup>31</sup> *McHenry v. Hazard*, 45 Barb. 657.

<sup>32</sup> *Knowles v. Inches*, 12 Cal. 212; see *Peterson v. Weissbein*, 70 id. 423.

<sup>33</sup> *Heywood v. City of Buffalo*, 14 N. Y. 541.

<sup>34</sup> *Merrill v. Gorham*, 6 Cal. 41; *Leach v. Day*, 27 id. 643; *Logan v. Hillegass*, 16 id. 200; *De Witt v. Hays*, 2 id. 463; 56 Am. Dec. 352; *Rogers v. City of Cincinnati*, 5 McLean, 337; held affirmatively in *Woolsey v. Dodge*, 6 id. 142; also *Segee v. Thomas*, 3 Blatchf. 11.

must be made to appear that the legal remedy would be adequate and complete.<sup>35</sup> And a preliminary suit at law is not necessary where the mischief would be irremediable.<sup>36</sup> When its purpose can be as fully accomplished by any other proceeding, an injunction will not be granted.<sup>37</sup> In California the rules and principles of equity practice remain unaltered, and the writ of injunction can only be issued where the case is one of equity jurisdiction.<sup>38</sup> But injunction will not be refused merely because the plaintiff would, on the same showing, be entitled to an order of arrest.<sup>39</sup> Where the question is doubtful, the burden of proof lies upon the party applying for an injunction to show that the argument, *ab inconvenienti*, is in his favor.<sup>40</sup> In all such cases the court should direct a trial at law, and in the meantime grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief.<sup>41</sup> An injunction will not be issued to protect a merely nominal interest.<sup>42</sup> Nor should it be granted to restrain an injury which may be amply compensated by damages.<sup>43</sup> An injunction can not be allowed to prevent a consequential injury, resulting from the lawful exercise of a right.<sup>44</sup> But an injunction is the proper remedy to stay a

<sup>35</sup> *Hager v. Shindler*, 29 Cal. 47; also, *Oil Co. v. Maginnis*, 32 Minn. 193; *Gardner v. Stroeve*, 81 Cal. 148; *Railroad Co. v. Long*, 46 Kan. 701; 26 Am. St. Rep. 165.

<sup>36</sup> *Foote v. Linck*, 5 McLean, 616.

<sup>37</sup> *Rogers v. Mich. So. R. R.*, 28 Barb. 541.

<sup>38</sup> *Minturn v. Hays*, 2 Cal. 590; 56 Am. Dec. 366; see, also, *Sankey v. St. Mary's Academy*, 8 Mont. 265.

<sup>39</sup> *Merritt v. Thompson*, 3 E. D. Smith, 294.

<sup>40</sup> *Child v. Douglas*, 5 De Gex, M. & G. 739; see *Coles v. Sims*, *id.* 9; *Bruce v. Del., etc., Canal Co.*, 19 Barb. 378; *Grey v. O. & P. R. R. Co.*, 1 Grant Cas. 412.

<sup>41</sup> *Hicks v. Michael*, 15 Cal. 116.

<sup>42</sup> *Wetmore v. Story*, 3 Abb. Pr. 281.

<sup>43</sup> *Marshall v. Peters*, 12 How. Pr. 221; *Mayor of N. Y. v. Schultz*, 31 *id.* 385. Nor in cases of liquidated damages. See *Willard's Eq. Jur.* 274, 278; *Hoffm. Pro. Rem.* 215; *Nessle v. Reese*, 19 Abb. Pr. 240; S. C., 29 How. Pr. 382; *Coles v. Sims*, 5 De Gex, M. & G. 9; *Nicholls v. Stretton*, 7 Beav. 42.

<sup>44</sup> *Williams v. New York Cent. R. R.*, 18 Barb. 247; S. C., 16 N. Y. 97; 69 Am. Dec. 651. There is no ground for merely preventive injunction when the acts complained of have been already performed, and the defendant has not threatened to do any other or further act tending to injure the plaintiff. *Gardner v. Stroeve*, 81 Cal. 148.



threatened injury to right of way;<sup>45</sup> though mere apprehension of a threatened wrong is not enough.<sup>46</sup>

§ 4231. *Injunction, when granted.* The plaintiff is entitled to an injunction at the time of issuing the summons on the complaint alone, if it makes a proper case, and is verified in the manner stated in the one hundred and thirteenth section of the Practice Act,<sup>47</sup> and verification may be by the plaintiff, or some one in his behalf; but if he asks for an injunction at any time thereafter, he must do so upon affidavits.<sup>48</sup> The injunction may be granted at any time after issuance of summons, before judgment, upon affidavits. The complaint in the one case, and the affidavits in the other, must show satisfactorily that sufficient grounds exist therefor.<sup>49</sup> When a restraining order or an injunction is sought upon the complaint itself, it is the usual practice to present the complaint in advance of the filing to the judge, and obtain the order or the allowance of the writ; and such practice is regular, and not in conflict with our statute.<sup>50</sup> In such case the order does not take effect until the filing of the complaint and the undertaking required.<sup>51</sup> When

<sup>45</sup> *Kittle v. Pfeiffer*, 22 Cal. 485.

<sup>46</sup> *Mariposa Co. v. Garrison*, 26 How. Pr. 448; *Jenny v. Crase*, 1 Cranch C. C. 443. Generally, on the subject of injunctions, see *Little v. Gould*, 2 Blatchf. 165, 184; *Linden v. Hepburn*, 3 Sandf. 668; *Tom v. Dally*, 4 Ohio, 368; *Steamboat Co. v. Livingston*, 3 Cow. 713; *Osborn v. Bank of U. S.*, 9 Wheat. 738; consult, also, *Mohawk, etc., R. R. Co. v. Artcher*, 6 Palge Ch. 83; *Hess v. Lupton*, 7 Ohio, 217; *Oakley v. Trustees, etc.*, 6 Palge Ch. 262; *McArthur v. Kelly*, 5 Ohio, 139; 2 Johns. Ch. 463; *Morton v. Beaver*, 5 Ohio, 178; *Walker v. Mad River, etc., Co.*, 8 Id. 38; *Moorhead v. Little Miami R. R. Co.*, 17 Id. 340; *Smith v. Pettingill*, 15 Vt. 82; *Jackson v. Bateman*, 9 Wend. 571; *Fredericks v. Mayer*, 1 Bosw. 232; *Fitzpatrick v. Flagg*, 5 Abb. Pr. 218; *Crocker v. Baker*, 3 Id. 182; *Perkins v. Warren*, 6 How. Pr. 341; *Spring v. Strauss*, 3 Bosw. 611; *In re Clark*, 10 How. Pr. 244; *Amerman v. Deane*, 132 N. Y. 355; 28 Am. St. Rep. 584; *Carleton v. Rugg*, 149 Mass. 550; 14 Am. St. Rep. 446; *Railroad Co. v. Gibson*, 85 Ga. 1; 21 Am. St. Rep. 135. To restrain boycotting, see *Sherry v. Perkins*, 147 Mass. 212; 9 Am. St. Rep. 689; *Casey v. Typographical Union*, 45 Fed. Rep. 135.

<sup>47</sup> Cal. Code Civ. Pro., § 527.

<sup>48</sup> *Falkinburg v. Lucy*, 35 Cal. 52; 95 Am. Dec. 76.

<sup>49</sup> Cal. Code Civ. Pro., § 527.

<sup>50</sup> *Heyman v. Landers*, 12 Cal. 107.

<sup>51</sup> Id. "No injunction granted prior to the actual trial of the cause wherein it is granted shall continue in force for a longer period than twelve months from the time such injunction was

the equities of a complaint are fully denied by affidavits on the part of defendant, an application for an injunction *pendente lite* should be denied.<sup>52</sup>

**§ 4232. Injunction before answer—affidavit in support of complaint.**

*Form No. 1027.*

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the attorney in fact of the said A. B., plaintiff in this action, for the purpose of suing for and recovering the [sum of money] mentioned in the complaint, by virtue of a power of attorney under seal, for that purpose duly executed and delivered.

II. That said A. B. is now absent from the city of . . . . ., and now, as I verily believe, a resident of . . . . ., in the republic of Mexico, he having left the city of . . . . ., for . . . . ., on or about the . . . . . day of . . . . ., 18..

III. I have read the complaint filed in this action, and know the contents thereof, and I have information as to all the matters stated therein [give sources of information], and from such information I believe such matters to be therein truly stated and such complaint to be true.

[JURAT.]

[SIGNATURE.]

**§ 4233. Affidavit in support of complaint by agent or clerk of defendant.**

*Form No. 1028.*

[TITLE.]

[VENUE.]

A. B., of . . . . ., being duly sworn, says as follows:

I. I am familiar with all the material matters stated in the complaint in this action on the information and belief of the plaintiff, and have actual knowledge thereof; and from such knowledge I know that the matters of fact therein stated are true.

II. Until within a few days last past, I was in the employ of said defendant as bookkeeper, and had free access to the

granted, except by consent of the parties, or unless the cause be set for trial upon its merits." Cal. Code Civ. Pro., § 527, as amended by act of March 12, 1895.

<sup>52</sup> *Gagliardo v. Crippen*, 22 Cal. 362.

books of said copartnership and of said defendant, and had and have personal knowledge of the financial and other business matters of the said concern, and of said defendant.

[JURAT.]

[SIGNATURE.]

§ 4234. **Complaint.** On a motion for an injunction, the plaintiff must rest on the case stated in the bill, though he may, by affidavits, state with more particularity any matters which it sets forth, and refer to collateral matters which explain or which tend to support and strengthen it; he may also in the same way contradict any statements made by the defendant in his affidavit, and either party may take and read the affidavits of other persons.<sup>53</sup> No injunction can be granted on the complaint unless it is verified.<sup>54</sup>

§ 4235. **Practice.** Where an injunction is granted on the complaint, a copy of the complaint and verification attached must be served with the injunction.<sup>55</sup> If the court or judge deems it proper that the defendant be heard before granting the injunction, an order may be made requiring the defendant to show cause at a particular time and place why the injunction should not be granted, and the defendant may in the meantime be restrained.<sup>56</sup> An injunction to suspend the general and ordinary business of a corporation can not be granted except by the court or a judge thereof, and then only upon notice, unless the people of this state are a party.<sup>57</sup>

<sup>53</sup> Crowder v. Tinker, 19 Ves. 621; Cooper v. Mattheys, 8 Law Rep. 413.

<sup>54</sup> Cal. Code Civ. Pro., § 527. In whose favor an injunction may issue, consult Thursby v. Mills, 1 Code Rep. 83; Edgumbe v. Carpenter, 1 Beav. 173; Waller v. Harris, 7 Paige Ch. 173; Winn v. Shaw, 87 Cal. 631; Barry v. Good, 89 id. 215; Yarnell v. Los Angeles, 87 id. 603.

<sup>55</sup> Cal. Code Civ. Pro., § 527. Notice and service of notice, see Canal Co. v. Superior Ct., 66 Cal. 311; Golden Gate, etc., Co. v. Superior Ct., 65 id. 187. Issue of injunction without notice, see Hobbs v. Canal Co., 66 Cal. 161; Morton v. Superior Ct., 65 id. 496. As to the undertakings, see *post*.

<sup>56</sup> Cal. Code Civ. Pro., § 530. Duration of restraining order, see San Diego Water Co. v. Steamship Co., 101 Cal. 216.

<sup>57</sup> Cal. Code Civ. Pro., § 531. As to dissolution of injunctions granted without notice, see Id., §§ 532 and 937.

**§ 4236. Undertaking on injunction.***Form No. 1029.*

[TITLE.]

Whereas, the above-named plaintiff has commenced or is about to commence an action in the Superior Court of the state of California, in and for the said county of . . . . ., against the above-named defendant, and is about to apply for an injunction in said action against said defendant, enjoining and restraining him from the commission of certain acts, as in the [affidavit] filed in the said action is more particularly set forth and described :

Now, therefore, we, the undersigned, residents of the said county of . . . . ., in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the sum of . . . . . dollars, and promise to the effect, that in case said injunction shall issue, the said plaintiff will pay to the said party enjoined such damages, not exceeding the sum of . . . . . dollars, as such party may sustain by reason of the said injunction, if the said Superior Court finally decide that the said plaintiff was not entitled thereto.

[DATE.]

[SIGNATURES AND SEALS.]

[Justification.]

**§ 4237. Must be given.** An injunction order is inoperative until the undertaking required by the statute be given.<sup>58</sup> But where the state, or the people of the state, or any state officer in his official capacity, or any county, city, or town is plaintiff, no undertaking is required.<sup>59</sup>

**§ 4238. Form of bond.** The proper form of an injunction bond is to answer all damages which the defendant may sustain in consequence of the injunction being granted.<sup>60</sup> The statutory condition is that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as such party may sustain by reason of the injunction, if the court finally decide that the plaintiff was not entitled thereto.<sup>61</sup>

<sup>58</sup> Elliott v. Osborne, 1 Cal. 396.

<sup>59</sup> Cal. Code Civ. Pro., § 1058.

<sup>60</sup> Bein v. Heath, 12 How. (U. S.) 168.

<sup>61</sup> Cal. Code Civ. Pro., § 529. This undertaking is required whether the injunction be granted upon an *ex parte* application or upon an order to show cause. McCracken v. Harris, 54 Cal. 81.

§ 4239. **Exception to bond.** The defendant may except to the sufficiency of the sureties within five days after the undertaking is filed. If he fails to do so, he is deemed to have waived all objections to them.<sup>62</sup> When excepted to, the sureties must justify before a judge or county clerk, upon notice to defendant of not less than two nor more than five days, in the same manner as upon bail on arrest, and upon a failure to justify, at the time and place appointed, the order granting an injunction shall be dissolved.<sup>63</sup>

§ 4240. **Order of injunction.**

*Form No. 1030.*

[TITLE.]

To .....

The plaintiff in the above-entitled cause having commenced an action in the Superior Court of the state of California, in and for the said county of ..... against the above-named defendant, and having prayed for an injunction against the said defendant, requiring ..... to refrain from certain acts in said complaint and hereinafter more particularly mentioned. On reading the said complaint in said action, duly verified by the oath of ....., and it satisfactorily appearing to me therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary undertaking having been given:

It is, therefore, ordered by me, the judge of said Superior Court, ....., that until further order in the premises, you, the said ....., and all your counselors, attorneys, solicitors, and agents, and all others acting in aid or assistance of you, and each and every of you, do absolutely desist and refrain from [here state acts to be enjoined, as in subsequent forms].

Dated this . . . . . day of ....., 18..

A. B., District Judge.

<sup>62</sup> Cal. Code Civ. Pro., § 529.

<sup>63</sup> Id. This section must be construed to mean that notice of justification must be given to the defendant of not less than two nor more than five days after the filing and service of the notice of exception to the deficiency of the sureties, and the plaintiff's sureties must justify within five days after said notice of exception is given, or the injunction will be dissolved upon motion. *McSherry v. Mining Co.*, 97 Cal. 637.

**§ 4241. Writ of injunction.***Form No. 1031.***[TITLE.]**

The People of the state of California to ..... send greeting:

The above-named plaintiff having filed ..... complaint in our Superior Court of the state of ....., in and for the county of ....., against the above-named defendant, praying for an injunction against said defendant, requiring ..... to refrain from certain acts in said complaint and hereinafter more particularly mentioned. On reading the said complaint in this action, duly verified [if affidavits are used, describe them], and it satisfactorily appearing to said court therefrom that it is a proper case for an injunction and that sufficient grounds exist therefor, and the necessary and proper undertaking having been given:

We, therefore, in consideration thereof, and of the particular matters in the said complaint set forth, do strictly command you, and each and every of you, that until the further order of said court, you and each of you, your and each of your servants, agents, attorneys, employees, and all persons acting under the control, authority, or direction of you or either of you do absolutely refrain from and desist from [here state acts to be enjoined].

[Tested, dated, and sealed as other writs.] <sup>64</sup>

**§ 4242. Order to show cause, and restraining order.***Form No. 1032.***[TITLE.]**

On the complaint of the plaintiff, duly verified [and upon the affidavits of ..... and .....], copies of all which are hereto attached, it is ordered that the said defendant show cause before me [or before this court] at ....., on the ..... day of ....., 18.., why an injunction should not be issued restraining him from [here state acts to be enjoined], and for such other and further relief as may be just.

And it is further ordered that said defendant, his agents and servants, be in the meantime restrained, and he the said de-

<sup>64</sup> No particular form is necessary for a writ of injunction. The substantial thing is an authentic notification to the defendants of the mandate of the judge, which they must then, at their peril, obey. *Summers v. Farish*, 10 Cal. 347.

fendant is, and each of his agents and servants are, hereby forbidden to suffer or commit any of said acts until the further order of the court.

[DATE.]

[SIGNATURE OF JUDGE.]

**§ 4243. Restraining order.** A restraining order is intended to continue only until the propriety of granting a temporary injunction can be determined.<sup>65</sup> Whether such order is of force without an undertaking being filed has been questioned.<sup>66</sup> We think, however, that the Code does not require it. The granting of such orders is purely within the discretion of the court, and doubtless an undertaking may be required as a condition of its allowance in cases where the order would necessarily cause loss or injury to the defendant if the right to an injunction did not exist. We understand, also, that it is the usual practice not to require an undertaking.

**§ 4244. Injunction order, after order to show cause.**

*Form No. 1033.*

[TITLE.]

On the return of the order to show cause, made by me in the above-entitled action, on the ..... day of ....., 18.., and returnable this day at my chambers in ..... [or before the court], after hearing A. B. for the plaintiff, and C. D. for the defendant, no sufficient cause to the contrary being shown: Ordered, that the said order to show cause be, and the same hereby is, made absolute, on the plaintiff executing and filing a written undertaking with ..... sufficient sureties, in accordance with the statute, to the effect that he will pay to the defendant such damages, not exceeding the sum of ..... dollars. as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff is not entitled thereto. And it is further ordered that the said defendant, and his agents and servants, be enjoined and restrained [state what from] until the further order of the court.

[DATE.]

[SIGNATURE OF JUDGE.]

<sup>65</sup> Cal. Code Civ. Pro., § 530; *Hicks v. Michael*, 15 Cal. 109; and see *San Diego Water Co. v. Steamship Co.*, 101 id. 216. The vitality of a restraining order, is not necessarily or even usually limited by the date mentioned in it. *Miles v. Edwards*, 6 Mont. 180.

<sup>66</sup> See *Harston's Pr.*, note to § 530. "The statute does not expressly require an undertaking as a condition for a restraining order, although this court has said one ought to be required." *San Diego Water Co. v. Steamship Co.*, 101 Cal. 216, 218.

**§ 4245. Injunction after answer.** An injunction shall not be allowed after the defendant has answered, unless upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the court or judge granting or refusing the injunction.<sup>67</sup> But when the answer to a bill for an injunction denies all the equity of a bill, a preliminary injunction should not be granted.<sup>68</sup>

**§ 4246. Notice of motion for injunction.**<sup>69</sup>

*Form No. 1034.*

[TITLE.]

To . . . . ., defendant's attorney:

Please take notice that on the complaint in this action [and the affidavits of . . . . . and . . . . ., copies of which are hereto attached], the undersigned will move the court, at the [courtroom], at . . . . ., on the . . . . . day of . . . . ., 18.., at . . . . . o'clock, A. M., or as soon thereafter as counsel can be heard, for an injunction to restrain the defendant, his agents and servants, from [state for what the injunction is required], and for such other or further order as may be just.

[DATE.]

[SIGNATURE.]

**§ 4247. Notice to be given.** Notice of an application by plaintiff for an injunction must be given for the length of time prescribed by the California Code of Civil Procedure, section 1005, that is to say, five days before the time appointed for the hearing, if the court be held in the same district, otherwise ten days, unless the court prescribe a shorter time. If given for a shorter time, and the defendant does not appear, he may treat an injunction thus obtained as granted without notice, and move to dissolve the same under section 532.<sup>70</sup> An application for an injunction should contain a description of the property sought to be protected by the decree, together with appropriate allegations of the danger or loss impending.<sup>71</sup>

<sup>67</sup> Cal. Code Civ. Pro., § 528; N. Y. Code, § 609.

<sup>68</sup> Crandall v. Woods, 6 Cal. 449.

<sup>69</sup> Under Montana Civil Practice Act an application for a temporary injunction is a motion for an order. Fabian v. Collins, 2 Mont. 510.

<sup>70</sup> Johnson v. Wide West M. Co., 22 Cal. 479.

<sup>71</sup> Blackburn v. Stannard, 5 Law Rep. 250.



§ 4248. **Statements in motion against violation of covenant to build.**

*Form No. 1035.*

From erecting upon [describe the land] any brewery or slaughter-house.<sup>72</sup>

§ 4249. **Joint interest.** Where the joint interest of the parties to a contract in its subject-matter has not commenced, the court will not, on the allegation of one party that he is injured by the acts of the others, interfere by injunction against the latter.<sup>73</sup>

§ 4250. **Service.** As a general rule, an injunction restraining a party from giving his services can not be granted.<sup>74</sup> But a distinguished vocalist was enjoined from singing in a certain theater in violation of her contract with the management of another.<sup>75</sup>

§ 4251. **Specific breaches.** In an action to enjoin for breach of covenant, the injunction will only be extended to breaches as to which the plaintiffs show that they require protection. General words prohibiting any act and breach of the covenants should not be inserted; for the court does not without necessity presume there will be a violation of the covenants.<sup>76</sup> Where the breaches of an agreement are numerous, and from the nature of the case the plaintiff would be able to give evidence of but few of them, he may be allowed an injunction.<sup>77</sup> Thus a covenant to stop all trains at a certain station will be enforced

<sup>72</sup> For another form, see *Mann v. Stephens*, 15 Sim. 38 Eng. Ch. 377.

<sup>73</sup> *Sloo v. Law*, 1 Blatchf. 512.

<sup>74</sup> *Fredericks v. Mayer*, 13 How. Pr. 571.

<sup>75</sup> *Lumley v. Wagner*, 1 De Gex, M. & G. 604; 13 Eng. L. & Eq. 252; overruling *Kemble v. Kean*, 6 Sim. 333; and to same effect, see *Carter v. Ferguson*, 58 Hun, 569; *McCaul v. Braham*, 16 Fed. Rep. 37; but see *contra*, *Sanquirico v. Benedetti*, 1 Barb. 315; *Hamblin v. Dinneford*, 2 Edw. Ch. 529; and see *Fredericks v. Mayer*, 13 How. Pr. 571; *Cort v. Lassard*, 18 Oreg. 221; 17 Am. St. Rep. 726; *Publishing Co. v. Telegraph Co.*, 83 Ala. 498.

<sup>76</sup> *Earl of Mexborough v. Bower*, 7 Beav. 127. Injunction to restrain breach of covenant. See *Amerman v. Deane*, 132 N. Y. 355; 28 Am. St. Rep. 584; *Werthelmer v. Circuit Judge*, 83 Mich. 56.

<sup>77</sup> *Niagara Falls Intern. Bridge Co. v. Great Western Railroad Co.*, 39 Barb. 212.

by injunction.<sup>78</sup> But an injunction will not be granted to enforce or protect an illegal contract.<sup>79</sup>

**§ 4252. Against resuming practice after having sold business.**

*Form No. 1036.*

From practicing as an attorney or solicitor in any part of . . . . ., either in his own name or the name of any other person; and from endeavoring to induce any persons who were the clients of A. & B. to cease or abstain from employing B. & C. as their attorneys or solicitors, and to cease the practice of the law in any manner in the said town of . . . . .

**§ 4253. Covenants of trade.** If a party covenants that he will not carry on his trade within a certain distance, or in a certain place, within which the other party carries on the same trade, a court of equity will restrain the party from breaking the agreement so made.<sup>80</sup> But this is allowed because of the utter uncertainty of any calculation of damages.<sup>81</sup> So if the contract names a penalty, injunction can not be granted, but the party aggrieved must sue for the penalty, even if defendant be insolvent.<sup>82</sup> Not so in England.<sup>83</sup> A contract not to engage or practice in a business is violated by acting as an employee in such business, and such violation will be enjoined.<sup>84</sup> Contracts in restraint of trade were regarded with great disfavor by the common law.<sup>85</sup> But the doctrine as generally held is limited to this: that a covenant not to exercise a trade, etc., anywhere, is void, but a covenant against the same, limited to a reasonable extent of district, within which competition would be possible, is valid.<sup>86</sup> A distinction has been drawn between a trade and

<sup>78</sup> *Lindsay v. Gt. N. R. R. Co.*, 19 Eng. L. & Eq. 87; S. C., 10 Hare, 664.

<sup>79</sup> *Bennett v. Am. Art Union*, 5 Sandf. 631; *Mott v. United States Trust Co.*, 19 Barb. 568.

<sup>80</sup> 2 Story's Eq. Jur., § 722a; *Giles v. Hart*, 5 Jur. (N. S.) 1381; *Whittaker v. Howe*, 3 Beav. 394; 1 Johns. (Eng.) 446.

<sup>81</sup> 2 Story's Eq. Jur., § 722a.

<sup>82</sup> *Vincent v. King*, 13 How. Pr. 238.

<sup>83</sup> See *Giles v. Hart*, 5 Jur. (N. S.) 1381; *Nichols v. Stretton*, 7 Beav. 42.

<sup>84</sup> *Rolfe v. Rolfe*, 15 Sim. 90.

<sup>85</sup> See 2 Pars. on Cont. 254, n.

<sup>86</sup> 2 Pars. on Cont. 254; and see *Martin v. Murphy*, 129 Ind. 464; *Nat. Benefit Co. v. Hospital Co.*, 45 Minn. 272; *Lewis v. Gollner*, 129 N. Y. 227; 26 Am. St. Rep. 516.

a profession;<sup>87</sup> and in this case a covenant not to practice law in Great Britain was held valid, though not without some hesitation. A covenant against violation of the law and policy of the state, for example, the Sunday Law, should be peculiarly favored.<sup>88</sup>

**§ 4254. Against carrying on business forbidden by lease.**

*Form No. 1037.*

From carrying on the hardware business, or selling hardware in the store No. .... street, in the city of .....; and from conducting therein any business other than [state what].

**§ 4255. Inconsistent reliefs — injunction lies.** A landlord can not demand an injunction against a breach of covenant, in the same action in which he demands a forfeiture of the lease. Such reliefs are inconsistent.<sup>89</sup> In chancery, a bill for injunction in such case must waive forfeiture and penalty.<sup>90</sup> For violation of the covenant in a lease not to use the demised premises for certain purposes, injunction lies;<sup>91</sup> and so even if it is a mere matter of taste.<sup>92</sup> But a covenant to carry on a particular business can not be enforced by injunction.<sup>93</sup> But the tenant may be restrained from doing, or permitting anything to be done, which will prevent the premises from being used for such purposes.<sup>94</sup> A covenant or agreement restricting the use of any lands or tenements, in favor of other lands, creates an easement, without regard to any priority or connection of title or estate in the two parcels or their owners.<sup>95</sup>

**§ 4256. Against removing fixtures.**

*Form No. 1038.*

From removing or causing to be removed from the premises hereinafter described any outhouse, shed, building, or addition,

<sup>87</sup> Whittaker v. Howe, 3 Beav. 394.

<sup>88</sup> Dodge v. Lambert, 2 Bosw. 578.

<sup>89</sup> Linden v. Hepburn, 3 Sandf. 668; S. C., 5 How. Pr. 188.

<sup>90</sup> Boteler v. Marmaduke, 3 Atk. 457.

<sup>91</sup> Dodge v. Lambert, 2 Bosw. 570; Howard v. Ellis, 4 Sandf. 369; Consolidated Coal Co. v. Schmisseeur, 135 Ill. 371.

<sup>92</sup> Steward v. Winters, 4 Sandf. Ch. 590.

<sup>93</sup> Hooper v. Broderick, 11 Sim. 49.

<sup>94</sup> Id.

<sup>95</sup> Whatman v. Gibson, 9 Sim. 196; Schreiber v. Creed, 10 id. 85; Mann v. Stephens, 15 id. 377; Brouwer v. Jones, 23 Barb. 153; Gilbert v. Peterler, 38 id. 488.

timber, building materials, or fixtures of any kind or character, said premises are known as . . . . ., at . . . . ., and described as follows [description].

§ 4257. **Misuse of premises.** A tenant will be restrained from pulling down a house leased to him and building another on its site, against the will of his landlord, without regard to the question whether such change would be an improvement or an injury to the premises.<sup>96</sup> An injunction will not be granted to a landlord to restrain tenants from removing a house, upon the ground that the security for the rent will be impaired by the removal, even though there is an express covenant in the lease that the buildings on the land shall stand as security for the rent, unless it appears that by the removal of the building the security will be left inadequate.<sup>97</sup>

§ 4258. **Removal of crop.** Where the petition set forth a lease and contract to pay in kind, a refusal to pay rent, and an allegation of removing the crop with intent to defraud the plaintiff of his rent, and a prayer for injunction, it was held that the injunction could not issue, unless plaintiff averred the insolvency of defendant, or an inability to make the rent on attachment or execution.<sup>98</sup>

§ 4259. **Against underletting.**

*Form No. 1039.*

For granting or making, or contracting to grant or make, any lease, under-lease, or assignment of any part of the premises [designating them] demised by E. F. to G. H., by a lease dated on the . . . . . day of . . . . ., 18.., and from granting or conveying the same in any manner or form, or by any means.

<sup>96</sup> *Smyth v. Carter*, 18 Beav. 78. Injunction will lie to restrain a mortgagor from removing fixtures from the mortgaged premises. *Dutro v. Kennedy*, 9 Mont. 101. Injunction against removal of buildings. See *Stowell v. Waddingham*, 100 Cal. 7; *Miller v. Waddingham*, 91 id. 377.

<sup>97</sup> *Perrine v. Marsden*, 34 Cal. 14.

<sup>98</sup> *Gregory v. Hay*, 3 Cal. 334. One who has title to a growing crop can enjoin another who is insolvent from harvesting and removing it. *West v. Smith*, 51 Cal. 323.

**§ 4260. Against transfer of stock by corporation.**

*Form No. 1040.*

From selling or transferring or issuing other stock therefor to one "A. B." or to any other person, ..... shares of the capital stock of the ..... company, which is standing on the books of the said company in the name of .....; and the said company in like manner to be restrained from permitting or making any sale, by public auction or otherwise, of said stock, or any part thereof, or from transferring the same on the books of said company, in any manner or by any means, or at all.

**§ 4261. Corporation suspended.** An injunction to suspend the general and ordinary business of a corporation shall not be granted except by the court or a judge thereof; nor shall it be granted without due notice of the application therefor to the proper officers or managing agent of the corporation, except when the people of the state are a party to the proceedings.<sup>99</sup> But this rule does not prevent a preliminary injunction from being granted against a hydraulic mining company restraining it from depositing its tailings and other mining *debris* in natural water-courses, by which such refuse material is washed down upon the land of another, although the same is granted without notice to the corporation.<sup>100</sup> A court of equity has no jurisdiction over corporations for the purpose of restraining their operations or winding up their concerns. Such court may compel the officers of the corporation to account for any breach of trust, but the jurisdiction for this purpose is over the officers personally, and not over the corporation.<sup>101</sup>

<sup>99</sup> Cal. Code Civ. Pro., § 531; N. Y. Code, § 224.

<sup>100</sup> *Golden Gate Con. M. Co. v. Superior Court*, 65 Cal. 187; *Hobbs v. Amador, etc., Can. Co.*, 66 id. 161.

<sup>101</sup> *Neall v. Hill*, 16 Cal. 145; 76 Am. Dec. 508; *Societe Francaise, etc. v. The Fifteenth District Court, etc.*, Cal. Sup. Ct., Dec. 11, 1878; consult *People v. Sturtevant*, 9 N. Y. 263; 59 Am. Dec. 536; *People v. The Mayor*, 10 Abb. Pr. 144; *Roberts v. The Mayor*, 5 id. 47; *Appleby v. The Mayor*, 15 How. Pr. 428; *McCafferty v. Glazier*, 10 id. 476; *People v. The Mayor*, 9 Abb. Pr. 254; *People v. Flagg*, 7 id. 179. As to restraining the payment of dividends, see *Carpenter v. N. Y. & N. H. R. R.*, 5 Abb. Pr. 279; *Carlisle v. S. E. R. R. Co.*, 1 Mac. & Gor. 689.

§ 4262. **Ferry right.** A ferry owner prevented from obtaining a renewal of his license, either by the incompetency or refusal of the supervisors to act in the premises, has a right to an injunction to restrain another party from running a ferry under an illegal license granted by the county judge, within a mile of the first-established ferry.<sup>102</sup>

§ 4263. **Foreign corporations.** The courts of New York will not grant injunctions to suspend the corporate franchises of a foreign corporation.<sup>103</sup> Nor will they, upon motion for a preliminary injunction, decide a question involving a forfeiture of corporate rights, unless it appear from the papers that serious injury will follow the refusal.<sup>104</sup> But directors may be restrained from committing fraudulent acts charged.<sup>105</sup>

§ 4264. **Laying out road.** An order of a board of supervisors, laying out a road, which is unconstitutional and null and void upon its face, does not affect or cloud the title to the land over which it passes, and an injunction will not be granted to restrain the carrying of the order into effect, but the party will be left to his remedy at law.<sup>106</sup>

§ 4265. **Railroad company.** When a railroad company is authorized to construct a road and to take private property, upon the performance of certain conditions precedent, their entry for such purposes is a proper subject for an injunction, if the condition is not performed.<sup>107</sup> An injunction has been granted to prevent a change of the gauge of a railroad.<sup>108</sup>

<sup>102</sup> Chard v. Stone, 7 Cal. 117; and see Railroad Co. v. Jones, 111 Penn. St. 204; 56 Am. Rep. 280; Town of Golconda v. Field, 108 Ill. 419.

<sup>103</sup> Way v. Keyport Steamboat Co., 16 Abb. Pr. 320.

<sup>104</sup> People v. Harlem Bridge Co., 1 Abb. Pr. (N. S.) 169. A preliminary injunction against a foreign corporation may be served by leaving with the agent designated to receive service of process, a copy of the writ, showing the original, and explaining its contents, and delivering to him a copy of the complaint. Canal Co. v. Superior Ct., 66 Cal. 311.

<sup>105</sup> Howe v. Deuel, 43 Barb. 505.

<sup>106</sup> Leach v. Day, 27 Cal. 643; see, also, Cal. Civ. Code, § 3423, subd. 7.

<sup>107</sup> Bonaparte v. Camden & Amboy R. R. Co., Baldw. 205.

<sup>108</sup> Columbus, etc., R. R. Co. v. Indianapolis, etc., R. R. Co., 5 McLean, 450.

§ 4266. **Stock, sale not enjoined.** The trustees of a mining corporation will not be enjoined from selling stock for unpaid assessments, in cases where the assessment is levied for the purpose of paying the proper and legal expenses of the company, if the assessment does not exceed the amount allowed by law.<sup>109</sup>

§ 4267. **In creditors' suits — against selling and conveying property.**

*Form No. 1041.*

From selling or conveying, by deed or otherwise, the following-described property [describe it], or selling, conveying, or otherwise transferring or incumbering any real or personal property held by you in trust, or otherwise acquired, received, or obtained from, by, or through [state how, or through whom, showing trust property or otherwise].

§ 4268. **Collecting money.** Under the ordinary injunction in a creditor's suit, it is a contempt to collect money earned before service of the injunction, and apply it to debts contracted for family supplies.<sup>110</sup>

§ 4269. **Execution.** A court of equity will take jurisdiction of a bill for an injunction, filed by attaching creditors of an insolvent, to restrain proceedings on execution against the property attached under a judgment against the debtor, in favor of another, alleged to have been obtained by fraud, where all the material allegations of the bill, except fraud, are admitted.<sup>111</sup> It would be requiring the creditors to do a vain act to compel them to await their judgment at law and a return of execution, when it is admitted that the only effect would be a return of *nulla bona*, and the property attached would in the meantime have passed to innocent purchasers on execution sale under the judgment.<sup>112</sup>

<sup>109</sup> *Sullivan v. Triunfo G. & S. M. Co.*, 29 Cal. 585.

<sup>110</sup> *Taggard v. Talcott*, 2 Edw. Ch. 628. The collection of notes obtained by fraud may be enjoined. *Hardy v. Nat. Bank*, 46 Kan. 88.

<sup>111</sup> *Heyneman v. Dannenberg*, 6 Cal. 376; 65 Am. Dec. 519.

<sup>112</sup> *Id.* Action to enjoin sale under an execution, see *Roth v. Insley*, 86 Cal. 134; *Porter v. Jennings*, 89 *id.* 440; *Grigsby v. Schwartz*, 82 *id.* 279; *Wilhelm v. Woodcock*, 11 Oreg. 518; *Parsons v. Hartman*, 25 *id.* 547; 42 Am. St. Rep. 803.

§ 4270. **Executors and administrators.** An injunction may be granted at the instance of parties claiming to be preferred creditors of an estate, to prevent an executor or administrator from making distribution of assets, or removing them beyond the jurisdiction of the court.<sup>113</sup>

§ 4271. **May proceed to judgment.** It seems that the debtor would not be prevented by it from proceeding to judgment, in a suit commenced before the injunction.<sup>114</sup> Nor is his act, in suing for a trespass, of itself a breach of the injunction.<sup>115</sup>

§ 4272. **Novation.** Merely carrying into effect, by procuring novation, a previous assignment of a right of action, is not a breach of the injunction in a creditor's suit.<sup>116</sup>

§ 4273. **Against transferring assets.**

*Form No. 1042.*

From selling, assigning, transferring, pledging, or otherwise disposing of any of his property, except what is by law exempt from execution; or from in any manner interfering therewith until the further order of the court.

§ 4274. **Fraudulent disposition of property.** An injunction may be granted restraining fraudulent disposition of property.<sup>117</sup> But an injunction granted for this purpose can not restrain the defendant from disposing of his property in a proper manner, but only from doing so with intent to defraud his creditors.<sup>118</sup> And an injunction was modified<sup>119</sup> by inserting the words "with intent to defraud," etc., but *quaere*, whether this is not, as far as movables are concerned, a mere *brutum fulmen*.<sup>120</sup> An offer

<sup>113</sup> *Green v. Hanberry*, 2 Brock. Marsh. 403; compare *Wilson v. Barstable*, 1 Cranch C. C. 394.

<sup>114</sup> *Parker v. Wakeman*, 10 Paige Ch. 485.

<sup>115</sup> *Hudson v. Plets*, 11 Paige Ch. 180.

<sup>116</sup> *Richardson v. Rust*, 9 Paige Ch. 243; to similar effect is *Ireland v. Smith*, 3 How. Pr. 244.

<sup>117</sup> *Reubens v. Joel*, 13 N. Y. 488; *Malcom v. Miller*, 6 id. 456; *Pomeroy v. Hindmarsh*, 5 id. 438; *Dickinson v. Benham*, 10 Abb. Pr. 391; *Lee v. Goss*, 126 Ind. 102.

<sup>118</sup> *Brewster v. Hodges*, 1 Duer, 610.

<sup>119</sup> See 25 Barb. 408.

<sup>120</sup> As to transfer of property generally, see *Reubens v. Joel*, 13 N. Y. 488, 492; overruling *Mott v. Dunn*, 10 How. Pr. 225; see *Moran v. Dawes*, Hopk. 365. Of specific personal property. *Erpstein v. Berg*, 13 How. Pr. 92; *Furniss v. Brown*, 8 id. 63; but see



to sell goods is not a violation of an injunction against the sale or parting with the control of them, but it may be good cause for appointing a receiver.<sup>121</sup>

**§ 4275. Against transferring negotiable paper.**

*Form No. 1043.*

From indorsing, assigning, or in any way transferring [describe note or bill] a promissory note drawn by A. B. in favor of the above-named C. D. for ..... dollars in gold coin, bearing date the ..... day of ....., 18.., and payable ..... months after said date, and accepted by the said C. D.

**§ 4276. Negotiable securities.** If an action for an equitable set-off is maintainable, an injunction lies to prevent one party who holds a negotiable note from disposing of it.<sup>122</sup>

**§ 4277. To restrain proceedings at law — on contract.**

*Form No. 1044.*

To restrain the defendant from proceeding further in his action at law against the above-named ....., upon the bond of the said A. B., dated the ..... day of ....., 18.., and from instituting or proceeding in any new or other action at law upon such bond; and from commencing any action or actions against the plaintiff for the recovery of [designating the alleged debt.]

**§ 4278. Against bringing suit.** An order of injunction, whereby the bringing of an action is restrained, will be reversed, notwithstanding an injunction bond has been given.<sup>123</sup> The prosecution of a suit at law against the heirs is not a violation of an injunction restraining the creditor from bringing suit against the executors for the debt.<sup>124</sup> The common order for an injunction in an interpleading suit is irregular, if it does not

28 Barb. 542. As to transfer of stock. *People v. Parker Vein Co.*, 10 How. Pr. 187.

<sup>121</sup> *Tyler v. Poppe*, 4 Edw. Ch. 430.

<sup>122</sup> *Schieffelin v. Hawkins*, 1 Daly, 289; *Osborne v. Bank of United States*, 9 Wheat. 738. As to the transfer of bonds, notes, etc., see *State of Illinois v. Delafield*, 8 Paige Ch. 527; 2 Hill, 177; approved in *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 137; 69 Am. Dec. 678; *Ingram v. Smith* 83 Cal. 234.

<sup>123</sup> *King v. Hall*, 5 Cal. 82.

<sup>124</sup> *Dale v. Rosevelt*, 1 Paige, 35.

make the issuing of the injunction dependent on the payment of the money into court.<sup>126</sup> When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of such injunction or prohibition is no part of the time limited for the commencement of the action.<sup>126</sup>

§ 4279. **Enjoining counsel.** In an action brought to restrain proceedings at law, it is improper to enjoin the counsel employed in those proceedings, unless something more is alleged against him than the prosecution of his client's rights.<sup>127</sup>

§ 4280. **When injunction lies.** An injunction operates to restrain not only the party enjoined, but other courts on the ground of judicial comity.<sup>128</sup> An injunction can not be granted affecting the rights and interests of parties who have no opportunity of being heard, and who are not secured by such bond as would compensate them for the injury and loss they might sustain in case the writ was improperly issued.<sup>129</sup> Injunction should never be permitted to issue when it is even suspected that it will be prostituted to the unworthy purpose of delaying, vexing, and harassing suitors at law in the prosecution of their claims.<sup>130</sup> Fraud and collusion in procuring the Circuit Court to exercise jurisdiction of an action is good ground for granting an injunction to restrain its prosecution.<sup>131</sup> Proceedings will not be restrained in any state court having jurisdiction in law and equity so that full justice can be done therein.<sup>132</sup> One

<sup>126</sup> *Pauli v. Von Melle*, 8 Sim. 327. Particular cases in which injunctions to restrain the prosecution of actions have been granted or refused. *Nixdorff v. Smith*, 16 Pet. 132; *Gaines v. Nicholson*, 9 How. (U. S.) 356; *Towne v. Smith*, 1 Woodb. & M. 115; *Fremont v. Merced Mining Co.*, 1 McAll. 267; *Kelley v. Kriess*, 68 Cal. 210; *Peterson v. Weissbein*, 70 id. 423; *Bergen v. Jeffries*, 80 Ala. 249; *Fielding v. Lucas*, 87 N. Y. 197; *Mills v. Seed Co.*, 65 Miss. 391; 7 Am. St. Rep. 671; see Cal. Civ. Code, § 3423, subd. 1.

<sup>128</sup> Cal. Code Civ. Pro., § 356.

<sup>127</sup> *Lord Wellesley v. Earl of Mornington*, 11 Beav. 180; *Davis v. Mayor of New York*, 1 Duer, 451.

<sup>128</sup> *Engels v. Lubeck*, 4 Cal. 31.

<sup>129</sup> *Patterson v. Yuba County*, 12 Cal. 105.

<sup>130</sup> *Truly v. Wanzer*, 5 How. (U. S.) 141.

<sup>131</sup> *Sawyer v. Gill*, 3 Woodb. & M. 97; *Van Vleeck v. Clark*, 38 Barb. 316; 24 How. Pr. 190.

<sup>132</sup> 6 Sandf. 612; *Bennett v. Leroy*, 5 Abb. Pr. 158; S. C., 14 How. Pr. 178; but see 25 Barb. 531; *Conover v. The Mayor*, 5 Abb. Pr. 410; generally, *Tarrant v. Quackenboss*, 10 How. Pr. 244; *Chappell*

District Court has no jurisdiction to enjoin a judgment rendered in another District Court. The fact that the judge of the court where the judgment sought to be enjoined was rendered is disqualified from sitting in the case does not constitute an exception to the rule.<sup>133</sup>

**§ 4281. Against entering confession of judgment.**

*Form No. 1045.*

From entering up judgment on a warrant of attorney [or statement of confession], executed by the plaintiff to the defendant [or otherwise naming the parties], and dated on or about the ..... day of ....., 18.., and from commencing any proceedings thereon.

**§ 4282. Adequate remedy at law.** A court of equity will not enjoin the execution of a judgment at law, upon grounds of which the party might have availed himself to defeat the action at law.<sup>134</sup> Where a bill in chancery was filed for the purpose of enjoining a judgment at law, obtained upon a promissory note, and the bill did not allege that adequate relief could not be had at law, nor did it show the necessity of interference by a court of equity to obtain a discovery, the bill must be dismissed.<sup>135</sup> An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of a party or counsel, where if the neglect were excusable full relief might have been had on motion in the original action.<sup>136</sup> Where a party failed to obtain the proper certificate of the referee, relying on verbal assurance of the attorney on the other side that he would agree to a statement, such party can not be considered free from fault and negligence, and he is not in a position to invoke the aid of a court of equity to enjoin a judgment obtained against him.<sup>137</sup>

*v. Potter*, 11 *Id.* 366; *Van Wagenen v. La Farge*, 13 *Id.* 16; *Mott v. U. S. Trust Co.*, 19 *Barb.* 569; see § 4230, *ante*.

<sup>133</sup> *Flaherty v. Kelly*, 51 *Cal.* 145. Enjoining prosecution of suit in foreign jurisdiction. See *Snook v. Snetzer*, 25 *Ohio St.* 516; *Wilson v. Joseph*, 107 *Ind.* 490; *Pickett v. Ferguson*, 45 *Ark.* 177; 55 *Am. Rep.* 545.

<sup>134</sup> *Truly v. Wanzer*, 5 *How. (U. S.)* 141.

<sup>135</sup> *Hungerford v. Sigerson*, 20 *How. (U. S.)* 156.

<sup>136</sup> *Borland v. Thornton*, 12 *Cal.* 440.

<sup>137</sup> *Phelps v. Peabody*, 7 *Cal.* 50.

§ 4283. **Attachment creditors.** A prior attaching creditor, whose attachment has been levied on the personal property of the defendant, can not after the recovery of a judgment be enjoined from selling the property attached, under execution, at the suit of a junior attaching creditor, unless, for a sufficient consideration, he has bound himself to the junior attaching creditor not to do so but to pursue some other course, to depart from which would result in irreparable mischief to the plaintiff.<sup>138</sup>

§ 4284. **Execution, sale under.** An injunction may be granted against levying an execution upon particular articles not properly subject to it, although it may not be proper to enjoin all proceedings on the execution.<sup>139</sup> Courts of equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings, rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree as when they have been misled by a mistake of fact as to the condition of the property or estate sold, provided application be made to them in suits in which such decrees are entered within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others.<sup>140</sup> The nature and extent of the relief in such cases are matter resting very much in the sound discretion of the court. As a general rule, the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or the parties, to allow the sale to stand. But when the relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rule as to

<sup>138</sup> *Domec v. Stearns*, 30 Cal. 114. As to necessity of a special clause restraining confession of judgment, etc., compare *McCredie v. Senior*, 4 Paige, 378; *Ross v. Clussman*, 3 Sandf. 676; *Fenner v. Sanborn*, 37 Barb. 610.

<sup>139</sup> *Sawyer v. Gill*, 3 Woodb. & M. 97. Particular cases where injunctions against proceedings on execution have been granted or refused. *Amis v. Meyers*, 16 How. (U. S.) 492; *Downer v. Brackett*, 21 Vt. 599; *Prout v. Gibson*, 1 Cranch C. C. 389; *Baker v. Glover*, 2 id. 682; and cases cited in § 4280, *ante*.

<sup>140</sup> *Goodenow v. Ewer*, 16 Cal. 470; 76 Am. Dec. 540.

mistake of law should apply, and from such, courts of equity seldom relieve.<sup>141</sup> A sheriff may be enjoined from selling real property belonging to the wife under an execution against the husband.<sup>142</sup>

§ 4285. **Execution and judgment void.** If a judgment upon which an execution issues and the execution itself are void upon their face, an injunction will not be granted to restrain a sale of property levied on under the execution, or the issuing of any other execution on the judgment.<sup>143</sup> A complaint to enjoin the sale of property under an execution, and the issuance of another execution on the judgment, is devoid of equity, which only avers that the judgment and execution are void on their face, and the insolvency of one of the defendants.<sup>144</sup> The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the court issuing the writ.

§ 4286. **Injury irreparable.** Defendant, as coroner and acting sheriff, levied on and advertised for sale all the right, title, and interest of T. in certain horses and cattle in the hands of a receiver appointed in a suit between J. and T., as partners; it was held that the plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable, and this must appear by a clear showing of plaintiff's right to the property and defendant's insolvency.<sup>145</sup>

§ 4287. **Judgments, when enjoined.** All proceedings to enjoin judgments must issue from the court having the control of such judgment.<sup>146</sup> To authorize the interposition of a court of chancery to enjoin a judgment at law, on the ground of newly-discovered facts, the proceedings must be taken by the defendant in the judgment at law.<sup>147</sup> Courts of equity will not interfere to enjoin a judgment not manifestly wrong, simply be-

<sup>141</sup> *Goodenow v. Ewer*, 16 Cal. 470; 76 Am. Dec. 540.

<sup>142</sup> *Alverson v. Jones and Bogardus*, 10 Cal. 9; 70 Am. Dec. 689; see, also, *Englund v. Lewis*, 25 Cal. 337; *Ford v. Rigby*, 10 id. 449; and *Pixley v. Huggins*, 15 id. 127.

<sup>143</sup> *Sanchez v. Carriaga*, 31 Cal. 170.

<sup>144</sup> *Id.*

<sup>145</sup> *More v. Ord*, 15 Cal. 203.

<sup>146</sup> *Gorham v. Toomey*, 9 Cal. 77; see *Flaherty v. Kelly*, 51 id. 145.

<sup>147</sup> *Mulford v. Cohn*, 18 Cal. 42.

cause of a defect in the evidence.<sup>148</sup> They will only interfere to enjoin a judgment at law rendered against a party by reason of fraud or accident, unmixed with any fault or negligence of himself or his agents. Any fact which clearly proves it to be against conscience to execute a judgment at law, and of which a party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with fault or negligence in himself or his agents, will authorize a court of equity to restrain the adverse party by injunction from availing himself of the judgment obtained at law.<sup>149</sup> Where a verdict has been obtained at law against a defendant, and he has neglected to apply for a new trial within the time appointed by the proper court of law, courts of equity will not entertain a bill for an injunction on the ground that the original demand was unconscientious.<sup>150</sup> If a party enters judgment for too much, or before the whole amount is due, it is not conclusive but only *prima facie* evidence of fraud to avoid the judgment.<sup>151</sup> Proceedings upon a judgment may be enjoined as to a part, and allowed to proceed as to the residue.<sup>152</sup> A bill to enjoin proceedings upon a judgment at law is not in general considered an original bill.<sup>153</sup> If, however, new parties are introduced, and different interests involved, it will be regarded as being to that extent an original bill.<sup>154</sup>

§ 4288. **Mortgage lien.** Plaintiff has a deed of property from H. and P. Subsequently N., execution creditor of H. and

<sup>148</sup> *Pico v. Sunol*, 6 Cal. 204.

<sup>149</sup> *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Truly v. Wanzer*, 5 How. (U. S.) 141; *Kelley v. Kriess*, 68 Cal. 210; *Rosenberger v. Bowen*, 84 Va. 660; *Johnson v. Christian*, 128 U. S. 374; *Thompson v. Loughlin*, 91 Cal. 313. A plaintiff who obtains judgment in violation of his written stipulation on file dismissing the action may be restrained by the court in which judgment was obtained from enforcing it. *McLeran v. McNamara*, 55 Cal. 508.

<sup>150</sup> *Phelps v. Peabody*, 7 Cal. 50.

<sup>151</sup> *Patrick v. Montader*, 13 Cal. 442; overruling *Taaffe v. Josephson*, 7 id. 356.

<sup>152</sup> *Dunlap v. Stetson*, 4 Mason, 349. Particular cases in which proceedings on judgments have been restrained. *Swan v. Bank of United States*, 2 Brock. Marsh. 293; *Greenleaf v. Maher*, 2 Wash. C. C. 393.

<sup>153</sup> *Simms v. Guthrie*, 9 Cranch, 19, 25; *Dunn v. Clarke*, 8 Pet. 1; *Williams v. Byrne*, Hempst. 472.

<sup>154</sup> *Id.*

P., causes the sheriff to levy on the property. Plaintiff files his bill to restrain the sale, as casting a cloud on his title. The court below found plaintiff's deed to be in effect a mortgage; it was held that the bill must be dismissed; that the purchaser at the sheriff's sale would only acquire the interest of the judgment debtors H. and P.; that plaintiff's rights, as mortgagee, would be unaffected by the sale, and hence there is no necessity for equity to interfere in his behalf.<sup>155</sup> Plaintiff purchased certain property under a sale on a decree foreclosing a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here. The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of the premises, under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of Wemple v. Pender, and has not yet got a sheriff's deed; it was held that an injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure not cutting off the rights of the mortgagor, Pender; that he, being entitled to possession under the sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might, under our statute, be sold for his debts; that if he chose to recognize the validity of Wemple's lien, or its enforcement, or sale under judgment, plaintiff can not complain, his rights not being affected by the proceedings, as he was not a party.<sup>156</sup>

**§ 4289. New trial.** Where a party moves for a new trial and fails, he can not on the same facts go into equity to enjoin the judgment rendered;<sup>157</sup> nor in any case where the remedy by motion in the other court is ample;<sup>158</sup> or the facts were known and might have been interposed as a defense.<sup>159</sup>

<sup>155</sup> Purdy v. Irwin, 18 Cal. 350.

<sup>156</sup> Macovich v. Wemple, 16 Cal. 104. Injunction restraining foreclosure sale. See Quinby v. Slipper, 7 Wash. St. 475; 38 Am. St. Rep. 899; Davis v. Hinchcliffe, 7 Wash. St. 199; McCormick v. Riddle, 10 Mont. 467; Archbishop v. Shipman, 69 Cal. 586; Buell v. Sav. Union, 65 id. 292.

<sup>157</sup> Collins v. Butler, 14 Cal. 223.

<sup>158</sup> Imlay v. Carpentier, 14 Cal. 173; Aldrich v. Stephens, 49 id. 676.

<sup>159</sup> Beaudry v. Felch, 47 Cal. 183; Railroad Co. v. Barrett, 65 Ga. 601; Clark v. Olapp, 14 R. I. 248; Fisher v. Greene, 5 Col. 541; Crim v. Handley, 94 U. S. 652. As to what a bill or complaint for



§ 4290. **Purchase money of land.** An injunction will not lie to restrain the collection of a judgment against the plaintiff, on the ground that the judgment was for a balance of purchase money of land under covenant for a good title, while in fact the grantor had no title so long as the purchaser against whom the judgment was taken, and who seeks to enjoin it, remains in possession.<sup>160</sup> A bill in chancery filed by the purchaser of land against his vendor to restrain the collection of purchase money, upon the two grounds of want of title in the vendor and his subsequent insolvency, without charging fraud or misrepresentation, can not be sustained.<sup>161</sup> Relief will not be given on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue in the pleadings.<sup>162</sup>

§ 4291. **Vendor's lien.** A vendor of real estate made a conveyance of it to the vendee, leaving a balance of the purchase money unpaid. The vendee afterwards mortgaged the same property to a third person, who knew of the vendor's claim for unpaid purchase money. The vendor brought an action at law against the vendee, obtained judgment for the balance due, issued execution, and sold the interest of the vendee in the property. The mortgagee afterwards foreclosed his mortgage, and was about to sell the property. The purchaser at the previous sale obtained an injunction to stay the sale, which was afterwards dissolved by the court, on the ground that he had purchased merely the vendee's equity of redemption, as the sale was subject to the rights of the mortgagee; it was held that this judgment of the court below was correct, and that the claim of the purchaser to be subrogated to the equitable lien of the vendor, if available at all, must be asserted in a separate equitable action.<sup>163</sup>

§ 4292. **Void judgment by default.** If a judgment by default be void, because of the absence of the seal of the District Court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the

new trial must show, see *Mulford v. Cohn*, 18 Cal. 46; *French v. Garner*, 7 Port. 552; *Duncan v. Lyon*, 3 Johns. Ch. 351.

<sup>160</sup> *Jackson v. Norton*, 6 Cal. 187.

<sup>161</sup> *Patton v. Taylor*, 7 How. (U. S.) 132.

<sup>162</sup> *Id.*

<sup>163</sup> *Allen v. Phelps*, 4 Cal. 256.



sheriff of the service of summons and copy of complaint, or because of irregularities of the clerk in entering the judgment, an injunction to restrain the enforcement thereof does not lie.<sup>164</sup> If such judgment be not void, but merely irregular, because of the defects named, and the defects can be reached by motion before judgment, or on appeal, then the complaint here to enjoin the enforcement of the judgment should aver that plaintiff has paid the claim for the recovery of which the action was brought, or that he has a valid defense to the same.<sup>165</sup>

§ 4293. *When injunction will not lie.* An injunction will not be granted to perpetually enjoin the collection of a judgment upon the ground of fraud, where the judgment was upon default, and granted more relief than the plaintiff was entitled to take from the action. The remedy is by appeal, and if void upon its face, the remedy is by motion in the court in which it is rendered.<sup>166</sup> Where in suit before a justice of the peace, defendant answers disputing plaintiff's claim, and afterwards, on a day set for trial — plaintiff being present, but defendant absent, and no one appearing for him — the justice renders judgment for plaintiff, without evidence, and "by default," as the docket reads, it was held that if the justice erred in his judgment, either upon the merits or as to form, the remedy is by appeal, and that such error can not be corrected by bill in equity to set aside the judgment and enjoin execution and sale thereon.<sup>167</sup>

§ 4294. *Against proceedings at law — ejectment.*

*Form No. 1046.*

To restrain the defendant ..... from proceeding further against the plaintiff ....., in this action commenced against him in the Superior Court of the state of ..... for the county of ....., for the recovery of the possession of [describe the premises], and also from instituting any action or proceeding in any new or other action at law for the recovery of the possession of said premises, or any part thereof, either in said court or in any other court.

<sup>164</sup> Logan v. Hillegass, 16 Cal. 200; Gregory v. Ford, 14 id. 141; 73 Am. Dec. 639; Gibbons v. Scott, 15 Cal. 286; Chipman v. Bowman, 14 id. 157.

<sup>165</sup> Id.

<sup>166</sup> Murdock v. De Vries, 37 Cal. 527.

<sup>167</sup> Hunter v. Hoole, 17 Cal. 418; Comstock v. Clemens, 19 id. 77.

§ 4295. **Equitable matter.** An injunction to stay an ejectment suit until matter of equity can be examined will not be allowed, except upon condition that judgment in the ejectment be entered.<sup>168</sup> Where a right to real estate has been satisfactorily established at law, a court of equity will interfere by injunction to prevent further litigation, without inquiring particularly what number of trials in ejectment have been had.<sup>169</sup>

§ 4296. **Grain crop as realty.** In an action for the possession of land on which was standing a crop of unharvested grain, and to set aside a conveyance on the ground of fraud, it was held, first, that the grain crop was part of the land, and plaintiffs were entitled thereto if entitled to recover the land; and, second, that an order made by the court *pendente lite*, restraining defendants from alienating or incumbering the land during the litigation, and appointing a receiver to take possession, harvest, and preserve the grain crop, was properly made.<sup>170</sup>

§ 4297. **Introduction of evidence.** Defendants, claiming title under a Mexican grant, and a patent issued upon its confirmation by the United States, bring ejectment against plaintiffs for certain premises in their occupation; plaintiffs, claiming as United States pre-emptioners, then file their bill in the same court to enjoin defendants from introducing in evidence or using the survey, plat, or patent, on the trial of the ejectment, until the determination of an action averred to be pending in the United States Circuit Court, by the United States against defendants and others claiming with them, to annul the survey, plat, and patent, on the ground of fraud in the survey, and in procuring the patent, the bill also averring such fraud; it was held that injunction does not lie; that the patent, until set aside, is conclusive evidence of the validity of the grant, of its recognition and confirmation, and also of the regularity of the survey, and of its conformity with the decree of confirmation; and that defendants, claiming to be pre-emptioners upon land of the United States, have no standing in court to resist the patent.<sup>171</sup>

§ 4298. **Restraining execution.** After judgment for the plaintiff in ejectment, brought for nonpayment of rent, the de-

<sup>168</sup> Turner v. American Baptist Missionary Union, 5 McLean, 344.

<sup>169</sup> Craft v. Lathrop, 2 Wall. Jr. C. O. 103.

<sup>170</sup> Corcoran v. Doll, 35 Cal. 476.

<sup>171</sup> Ely v. Frisbie, 17 Cal. 250.

fendant can not show, in a bill of equity brought to restrain the execution of the judgment, that the rent ought, under the stipulations of the lease, to have been reduced in amount.<sup>172</sup>

§ 4299. **Title acquired pendente lite.** Relief will be granted by way of injunction in equity, where the tenant has, pending the suit, acquired a title paramount to that of the demandant, if he can not avail himself of it as a defense to the original suit at law, or can not after recovery maintain an action to regain possession.<sup>173</sup>

§ 4300. **Who may enjoin.** A stranger to the title of real property, though in possession, can not go into equity and enjoin the purchasers and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person who does not complain. Having no title himself, it is immaterial to him whether he be evicted by such purchasers or their vendor.<sup>174</sup> The fact that suit in ejectment has been commenced against the judgment debtor by the real owner does not entitle him to enjoin the judgment. He can only avail himself of the covenants of his grantor when he has been evicted, unless he offers to surrender the land to his grantor. Neither does the allegation that the purchaser (plaintiff in equity) has put valuable improvements on the land, and that he has paid a portion of the purchase money, and that his grantor and judgment creditor is insolvent and without visible property, take the case out of the rule. One who is the owner of land, and in possession of the same, is not entitled to an injunction to restrain a sheriff from executing a writ of restitution, issued on a judgment, rendered against third parties, to which judgment the plaintiff is a stranger.<sup>175</sup>

§ 4301. **Nuisances — against building a railroad on plaintiff's land.**

*Form No. 1047.*

From entering upon any part of the lands hereinafter described, for the purpose of constructing a railroad thereon, or from laying down a railroad track thereon, or from maintaining

<sup>172</sup> *Sheets v. Selden*, 7 Wall. 416.

<sup>173</sup> *Bright v. Boyd*, 1 Story C. O. 478.

<sup>174</sup> *Treadwell v. Payne*, 15 Cal. 496.

<sup>175</sup> *Tevie v. Ellis*, 25 Cal. 516; *Tomlinson v. Rubio*, 16 id. 202, disapproved.

a railroad thereon, or running cars across, over or upon the said land. The said premises are known as . . . . ., and bounded and described as follows [description].

§ 4302. **Condemnation of land.** Where the statute under which the proceedings for the condemnation of land for road purposes is taken is unconstitutional, or its provisions are not strictly pursued, or notice is not given to the owner of the land, or the compensation is not tendered to him, a perpetual injunction against opening the road will be granted.<sup>176</sup> A perpetual injunction against opening a road, under proceedings which have been taken, does not prevent laying out a road at any future time over the same land, whenever the proper steps are taken to acquire the right of way, and the right has been secured.<sup>177</sup> Where the land was a public highway subject to the public use, though the fee was in the plaintiff, and plaintiff had never received compensation for the use of the land by a railroad which was laid thereon, though it appeared that the railroad company was induced to construct its railroad upon said avenue by the express consent and license of the plaintiff, it was held that plaintiff was not entitled to an injunction to restrain the company from running its cars.<sup>178</sup>

§ 4303. **Against laying a railroad in the streets of a city.**

*Form No. 1048.*

From entering into or upon Montgomery street, in said city, for the purpose of laying or establishing a railroad therein, and from digging up or subverting the soil, or doing any other act in said street tending to obstruct or incumber it, or to prevent the free and common use thereof, as the same have been heretofore enjoyed, and from laying down any ties or railroad iron therein.

§ 4304. **Extension of railroad track.** An injunction lies at the suit of the people to restrain a railroad company from laying an extension of their track in the streets of the city without authority of law.<sup>179</sup> Or to lay a railroad track in a peculiar

<sup>176</sup> Curran v. Shattuck, 24 Cal. 431; Payne v. Railroad Co., 46 Fed. Rep. 546; Pratt v. Roseland Ry. Co., 50 N. J. Eq. 150.

<sup>177</sup> Id. As to trespasses by a railroad, see Williams v. N. Y. C. R. R., 16 N. Y. 111; 69 Am. Dec. 651; reversing S. C., 18 Barb. 222.

<sup>178</sup> Murdock v. Prospect Park, etc., R. R. Co., 10 Hun, 598.

<sup>179</sup> People v. Third Ave. R. R. Co., 45 Barb. 63; S. C., 30 How. Pr. 121.

case.<sup>180</sup> But not after the Legislature has granted right to lay the track.<sup>181</sup>

§ 4305. **Public nuisances.** Public nuisance may be enjoined if it subjects a party to special injury.<sup>182</sup> An individual may have an injunction to prevent a public nuisance, when such nuisances created will be an extraordinary injury, irreparable in damages, or irremediable at law, or produce a multitude of suits.<sup>183</sup> Or the same may be restrained on application of the attorney-general.<sup>184</sup> Where a bill is filed by the people, on the relation of the attorney-general, to enjoin the state treasurer from paying money out of the treasury, on the ground of the unconstitutionality of the act directing the treasurer to make the payment, and the court, on the final trial, deny the injunction, the judgment denying the injunction shall not contain a clause adjudging and decreeing that the treasurer pay over the money as required by the law.<sup>185</sup> Injunction lies at the suit of an abutting house-owner to enjoin a street railroad company from leaving snow, which it removes from its tracks, heaped up between them and plaintiff's premises for a longer period than

<sup>180</sup> *Dry Dock R. R. Co. v. N. Y. & Harlem R. R. Co.*, 30 How. Pr. 39.

<sup>181</sup> *Sixth Avenue R. R. Co. v. Kerr*, 45 Barb. 138; affirmed, S. C., 28 How. Pr. 382. As to the discontinuance of a portion of a railroad track, see *People v. Albany & Vt. R. R. Co.*, 11 Abb. Pr. 136. As to the nuisance of lands appropriated for a railroad, see *Bostock v. N. S. Ry.*, 3 Sm. & Giff. 283.

<sup>182</sup> *Milhau v. Sharp*, 27 N. Y. 611; 84 Am. Dec. 314; S. C., 17 Barb. 435; S. C., 9 How. Pr. 102; S. C., 28 Barb. 228; S. C., 7 Abb. Pr. 220; *Woodruff v. North Bloomfield, etc., Min. Co.*, 1 West Coast Rep. 133.

<sup>183</sup> *Parrish v. Stephens*, 1 Oreg. 73; *Esson v. Wattier*, 25 id. 7. It is held that the extent of damage does not affect the right. *Learned v. Castle*, 78 Cal. 454; but see *Bernheimer v. Railway Co.*, 26 Abb. N. C. 88. The complaint must show special damage to the plaintiff, and facts must be stated to show that the apprehension of injury is well founded. *Payne v. McKinley*, 54 Cal. 532; and see *Nicholson v. Getchell*, 66 id. 394; *Esson v. Wattier*, 25 Oreg. 7. An action to abate a nuisance is a suit in equity, and an injunction against its continuance may be issued therein, although it is not specifically prayed for in the complaint. *McMenomy v. Band*, 87 Cal. 134.

<sup>184</sup> *Davis v. Mayor of N. Y.*, 2 Duer, 663; 14 N. Y. 506; 67 Am. Dec. 186; *Mechling v. Kittanning Bridge Co.*, 1 Grant's Cases, 419; *People v. Gold Run, etc., Min. Co.*, 66 Cal. 155.

<sup>185</sup> *People v. Pacheco*, 27 Cal. 227.

is reasonably necessary to remove it.<sup>186</sup> Where a plaintiff has proved his right to an injunction against a nuisance, it is not for the court to inquire how the defendant can best remove it. The plaintiff is entitled to an injunction at once, unless the removal of the nuisance is physically impossible. But when the difficulty of removing the injury is great, the court will suspend the operation of the injunction for a time, with liberty to the defendant to apply for an extension of time.<sup>187</sup> Nothing can be restrained as a nuisance which the Legislature has authorized.<sup>188</sup>

§ 4306 **Railroad, when a nuisance.** A railroad may be a nuisance if constructed on a crowded highway.<sup>189</sup> The establishment and running of a horse railroad in a public street imposes an additional burden on the land, and may be enjoined at the suit of an adjoining proprietor who owns to the middle of the street — that is, if the railroad company have not a right to do so.<sup>190</sup> But where the fee of the streets is in the city where they are located, and the city has full power to control and regulate their use, a court of equity will not, at the suit of an individual, enjoin a railway company from operating its road laid in the street without permission of the city, but will leave the redress to the city authorities.<sup>191</sup>

<sup>186</sup> *Prime v. Twenty-third Street R. R. Co.*, 1 Abb. N. C. 63.

<sup>187</sup> *Attorney-General v. Colney Hatch Lunatic Asylum*, L. R., 4 Ch. 146. As to injunctions for nuisances generally, see *McOord v. Iker*, 12 Ohio, 387; *Spooner v. McConnell*, 1 McLean, 337; *Webb v. Portland Mfg. Co.*, 3 Sumn. 189; *Bemis v. Upham*, 13 Pick. 169; *Bardwell v. Ames*, 22 id. 333; 6 Johns. Ch. 439; *Prescott v. White*, 21 Pick. 344; *Attorney-General v. Lea's Heirs*, 3 Ired. Eq. 301; *Davis v. The Mayor, etc.*, 14 N. Y. 526; 67 Am. Dec. 186; *Penniman v. N. Y. Balance Co.*, 13 How. Pr. 42; see, also, *Wier's Appeal*, 74 Penn. St. 230; and *Oglesby Coal Co. v. Pasco*, 79 Ill. 164. Several persons may join in the prayer for injunction. 3 Sandf. 129, n.; *Murray v. Hay*, 1 Barb. Ch. 59; *Reld v. Gifford*, Hopk. 419. Held otherwise in England. *Hudson v. Maddison*, 12 Sim. 416.

<sup>188</sup> *Davis v. The Mayor, etc.*, 14 N. Y. 506; S. C., 2 Duer, 663; 67 Am. Dec. 186; *State v. Nelson County*, 1 N. Dak. 88; 26 Am. St. Rep. 609; but see *Phoenix v. Comm'rs of Immigration*, 1 Abb. Pr. 473, 474.

<sup>189</sup> *Davis v. The Mayor*, 14 N. Y. 524; but see id. 531; 67 Am. Dec. 186; *State v. Nelson County*, 1 N. Dak. 88; 26 Am. St. Rep. 609; *Hentz v. L. I. R. R. Co.*, 13 Barb. 656; *Drake v. Hudson R. R. Co.*, 7 id. 548, 558.

<sup>190</sup> *Craig v. Rochester City & B. R. R. Co.*, 39 N. Y. 404.

<sup>191</sup> *Patterson v. Chicago, etc., R. R. Co.*, 75 Ill. 588.

§ 4307. **Steam-engine.** An injunction may be issued to restrain defendant from running his steam-engine so close to plaintiff's premises as to jar his house.<sup>192</sup>

§ 4308. **The same — another form.**

*Form No. 1049.*

That an injunction order may be issued by this court, directed to the said defendants and each of them, their agents, servants, and attorneys, restraining and enjoining them, and each and every of them, and all others acting in aid or assistance of them, or any other person or persons whomsoever, from laying a double or any track for a railway in Battery street, from Jackson to Bush streets, in the city and county of San Francisco, or any railway whatever in said Battery street, or of breaking or removing the pavement, or in any other manner obstructing the said street, preparatory to or for the purpose of laying or establishing any railway therein, or from maintaining or running or operating a railroad therein.<sup>193</sup>

§ 4309. **Appropriation of a public street.** Where plaintiff seeks an injunction to restrain the appropriation of a public street, on the ground of a special injury to him by preventing access to his adjoining lot, he should specify this grievance in his complaint; a general charge that the work will be specially injurious to him is not sufficient. But if no motion is made to require the plaintiff to reform his complaint in that respect, and no objection is made upon the trial to the introduction of evidence tending to show such injury, the objection will be considered as waived.<sup>194</sup> The breaking up of the street of a town for the purpose of laying gas-pipes, without lawful authority, is not such a nuisance as will be enjoined in equity, on an information at the relation of a rival gas company.<sup>195</sup>

§ 4310. **Against continuance of slaughter-house.**

*Form No. 1050.*

From using or occupying a building erected by the defendant C. D., on the east side of Harris street, between Townsend and Brannan, in the city of San Francisco, as a slaughter-house,

<sup>192</sup> *McKeon v. Lee*, 28 How. Pr. 238; compare *Middleton v. Franklin*, 3 Cal. 238; *McMenomy v. Band*, 87 Id. 174.

<sup>193</sup> For another form, see *People v. Sturtevant*, 9 N. Y. 263; 59 Am. Dec. 536.

<sup>194</sup> *Wetmore v. Story*, 22 Barb. 414; S. C., 3 Abb. Pr. 262.

<sup>195</sup> *Attorney-General v. Cambridge Consumers' Gas Co.*, L. R., 4 Ch. 71.



and from slaughtering any animals or from dressing any slaughtered animals in such building, and from permitting the building to be used as a slaughter-house by others.

**§ 4311. Burning brick.**

*Form No. 1051.*

From burning or manufacturing, or causing to be burned or manufactured, bricks on a certain piece of land or premises in the defendant's possession [describe premises], situate in the town of ....., in the county of ....., and whereon is erected a brick-kiln, or from permitting or causing bricks to be burned or manufactured thereon.

**§ 4312. Against erecting and to compel removal of buildings.**

*Form No. 1052.*

From continuing the erection of a certain projected building on the garden, grounds, or plat of ground, described as follows [description], or any part thereof; and also from permitting or allowing such part of said building as has already been erected on said described garden or plat of ground from remaining thereon.

**§ 4313. Against the diversion of water.**

*Form No. 1053.*

From diverting the waters, or any part thereof, of the American river, at ....., so that the whole of said waters will not flow down its natural channel to .....

**§ 4314. Diverting water.** Plaintiffs file their bill in equity to enjoin defendants from diverting a certain quantity of the water of Bear river, alleging that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes, that such quantity was necessary to their use, and that defendant had diverted the same, to their damage, etc. Plaintiffs had verdict, and judgment for twenty-one thousand dollars damages; it was held that the averments are insufficient to entitle plaintiffs to an injunction, the scope of the bill being simply to enforce in equity plaintiffs' alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit.<sup>196</sup> That an

<sup>196</sup> McDonald v. Bear River & Auburn Water & Mining Co., 15 Cal. 145.



injunction to restrain a diversion of the water of a stream by a canal in Rhode Island, made by citizens of that state, whereby mills in Connecticut are injured, may be granted in a suit in the Circuit Court for the district of Rhode Island, brought by citizens of Connecticut, the owners of the mill.<sup>197</sup>

§ 4315. **Diversion for irrigation.** The construction of a reservoir across the bed of a ravine, for the purpose of collecting the water flowing down the same, to be used in irrigating a garden or fruit trees, gives the party constructing the same a vested right of property in the reservoir, and the right to have the water flow into the same, of which he can not be divested by persons subsequently entering for mining purposes, and a court of equity will enjoin miners thus entering from injuring the reservoir or diverting the water therefrom.<sup>198</sup> When there is no pretense that any injury was occasioned willfully by the defendant, and there is no finding of unskillfulness, an injunction will not issue to prevent the exercise of his right to irrigate his crops, although an annoyance or injury may be thereby occasioned to the plaintiffs.<sup>199</sup>

§ 4316. **Percolating water.** Where plaintiffs appropriated, possessed, and used a spring of running water upon land which they occupied; and defendants dug a well upon adjoining land occupied by them; and after the digging of the well the spring dried up, though there was no visible connection between the well and the spring — the flow of water into defendant's land being by percolation, it was held that plaintiffs had no cause of action either for damages or injunction.<sup>200</sup>

§ 4317. **Watercourse.** Injunction will lie to compel defendants to restore the waters to their natural beds or channels;<sup>201</sup>

<sup>197</sup> *Stillman v. White Rock Manufacturing Co.*, 3 Woodb. & M. 538. Injunction against diversion of water. See *Horsky v. Water Co.*, 13 Mont. 229; *City of Salem Co. v. Mining Co.*, 12 Oreg. 374, 384. Injunction will not be granted, when. See *McBroom v. Thompson*, 25 Oreg. 559; 42 Am. St. Rep. 806; *Wintermute v. Water Co.*, 3 Wash. St. 727.

<sup>198</sup> *Rupley v. Welch*, 23 Cal. 452.

<sup>199</sup> *Gibson v. Puchta*, 33 Cal. 310. Enjoining destruction of levee. See *Belcher v. Murphy*, 81 Cal. 39; *Grimshaw v. Belcher*, 88 id. 217.

<sup>200</sup> *Mosler v. Caldwell*, 7 Nev. 363.

<sup>201</sup> *Corning v. Troy Iron & Nail Co.*, 6 How. Pr. 89; S. C., 39 Barb. 311.

also to restrain the pollution of a stream by which the fish in ponds built by plaintiff were killed.<sup>202</sup> Where a suit is brought to test the question as to the priority of appropriation of water, a prayer for an injunction to prevent future injury is proper.<sup>203</sup> Where the right of the use of running water is based upon appropriation, and not upon ownership of the soil, priority of appropriation gives the superior right.<sup>204</sup> Possession or actual appropriation must be the test of priority in all claims to the use of water.<sup>205</sup>

**§ 4318. Against flooding mining claim.**

*Form No. 1054.*

From permitting the flood-gates of the defendant's reservoir to be open in such a manner as that the waters therefrom shall thereby flow the said plaintiff's mining claim in ..... canyon, and thereby make it inconvenient or impossible for plaintiff to work said mine.

**§ 4319. Water for mining purposes.** A complaint alleging that plaintiffs had for a long time conveyed water from a stream for mining purposes by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in the peaceable possession thereof, when defendants wrongfully diverted the same and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction.<sup>206</sup> Where plaintiff owns a mining ditch with right of way for it, having acquired such right by priority of location, the court should not, in an action to enjoin another party from washing it away, limit the plaintiff's right by allowing the ditch to be washed away if defendant would build a flume or other aqueduct to replace it; but should enjoin the washing away of the ditch.<sup>207</sup> No equitable remedy can be had for a mere

<sup>202</sup> *Seaman v. Lee*, 10 Hun, 607.

<sup>203</sup> *Marius v. Bicknell*, 10 Cal. 217; consult also *Olmsted v. Loomis*, 9 N. Y. 428; *Belknap v. Trimble*, 3 Paige, 600; *Gardner v. Village of Newburgh*, 2 Johns. Ch. 164; 7 Am. Dec. 526; *Corning v. Troy Iron & Nail Co.*, 6 How. Pr. 94; *Bruce v. Del. & Hud. Canal Co.*, 19 Barb. 379; see, also, *Fairhaven, etc., Co. v. Adams*, 46 Vt. 496.

<sup>204</sup> *Ophir S. M. Co. v. Carpenter* 4 Nev. 534; 97 Am. Dec. 550.

<sup>205</sup> *Kimball v. Gearhart*, 12 Cal. 29; *Nev. Co., etc., Canal Co. v. Kidd*, 37 Id. 283.

<sup>206</sup> *Tuolumne Waater Co. v. Chapman*, 8 Cal. 392; and see *Jatunn v. O'Brien*, 89 Id. 57; *Allen v. Water Co.*, 92 Id. 138.

<sup>207</sup> *Gregory v. Nelson*, 41 Cal. 278.

past diversion of a watercourse; but when the injury is continuing, relief may appropriately be sought in equity.<sup>208</sup> Plaintiffs are owners of mining claims located in the bed of a creek, and defendants own claims situated on a hill in the vicinity. The refuse matter washed from defendants' claims is deposited on plaintiffs' claims to such an extent as to render the working of them impracticable. Plaintiffs' claims were first located, and are valuable only for the gold they contain; it was held that plaintiffs are entitled to damages for the injuries done their claims by such deposit, and to an injunction against the same in future; that the enjoyment of their claims lies in the use necessary to obtain the gold, and that to interrupt this use is to take away the opportunity to enjoy, and defeat the object for which they were located and taken possession of.<sup>209</sup>

**§ 4320. Against building pier or wharf.**

*Form No. 1055.*

From constructing, or causing to be constructed, a certain wharf at . . . . ., whereby vessels can not enter or leave with convenience or safety at plaintiff's wharf, which wharf extends from the foot of . . . . . street into the bay [or state facts as they exist].

**§ 4321. Commerce.** A nuisance injurious to the commerce of a town may be enjoined at the suit of a private individual owning property in such town, and being himself engaged in its commerce.<sup>210</sup>

**§ 4322. Ferry rights.** An injunction to protect the exclusive privilege to a ferry does not conflict or interfere with the right of a boat to carry passengers or goods in the ordinary prosecution of commerce, without the regularity or purpose of ferry trips; that remedy applies only to one which is run avowedly as a ferry boat.<sup>211</sup>

**§ 4323. Obstructing highways.** It is material for a complainant suing for an injunction to prevent a threatened destruction

<sup>208</sup> *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

<sup>209</sup> *Logan v. Driscoll*, 19 Cal. 623; 81 Am. Dec. 90.

<sup>210</sup> See *Works v. Junction Railroad*, 5 McLean. 425.

<sup>211</sup> *Conway v. Taylor*, 1 Black, 603; and see *Hunter v. Moore*, 44 Ark. 184; 51 Am. Rep. 589.

of a river to state that he is engaged in navigating the waters of the same.<sup>212</sup> A bill was filed to restrain a railway company from placing an obstruction partly on a public way and partly on the land of the plaintiff, a rival railway company, so as to block up the access to a station of the plaintiffs, and alleged that the injury caused by the continuance of the obstruction would be irreparable, and that the act was done without any color of title. On demurrer it was held that this was a case in which the court would enjoin trespass by a stranger.<sup>213</sup> But where a railroad company was chartered with the privilege of running its road from such a point within an incorporated city as the city officers should designate, and a point was designated, and the railroad authorized to lay its tracks along certain streets, it was held that no public nuisance was thereby created, and that a court of equity would not entertain a bill in the name of one or more private citizens to restrain the obstruction of a public street, where no private injury or threatened injury was alleged to such citizens or their property.<sup>214</sup> It is, however, the settled law of Wisconsin that an obstruction which prevents a lawful use of a public highway, besides being a public nuisance, is a special injury to adjoining lotowners, against which, when threatened, they may have an injunction.<sup>215</sup>

§ 4324. **Wharves.** Where the court is satisfied that a wharf erected in tide-waters and upon soil thereunder belonging to the state is not a public nuisance, an injunction should be refused, or dissolved if one has been temporarily granted.<sup>216</sup> The District Courts, as courts of equity, have no power to decree the destruction, or to enjoin a purpresture caused by the erection of a wharf in tide-waters, and upon the soil thereunder belonging to the state, without a license from the state, unless it is or will be a public nuisance, or is or will be followed by some form of irreparable damage, or unless it is or will be a hindrance to the execution of some legislative act relating to fishery or to commerce or navigation.<sup>217</sup> A person who is the owner and in possession of a private wharf is entitled to a perpetual injunc-

<sup>212</sup> *Spooner v. McConnell*, 1 McLean, 337.

<sup>213</sup> *London & N. W. R. R. Co. v. Lancashire & Yorkshire R. R. Co.*, L. R., 4 Eq. 174.

<sup>214</sup> *Coast Line R. R. Co. v. Cohen*, 50 Ga. 451.

<sup>215</sup> *Pettibone v. Hamilton*, 40 Wis. 402.

<sup>216</sup> *People v. Davidson*, 30 Cal. 379.

<sup>217</sup> *Id.*

tion restraining the construction of another wharf in front of his, which will cut off his wharf from the navigable waters, unless the persons constructing the same show a lawful right, proceeding from competent authority, to erect the proposed wharf. And a statute authorizing such construction must be strictly followed.<sup>218</sup> The remedy to prevent erecting a nuisance in a bay or navigable river is by injunction at the suit of the attorney-general.<sup>219</sup> But an injunction will not be granted to restrain the erection of what may possibly prove a nuisance.<sup>220</sup>

**§ 4325. Against selling or disposing of partnership property.**

*Form No. 1056.*

That defendant be restrained from selling, assigning or otherwise disposing of any of the property, personal or real, belonging to the copartnership above named, and from collecting, receiving, or otherwise handling said property, or any part thereof, except to retain the same; from changing position of or transporting, moving, or conveying any of the personal property or moneys of said copartnership.

**§ 4326. Interference with partnership property.** An injunction forbidding defendant to interfere with "any of the said partnership property, or from collecting the partnership debts or other moneys," but containing no reference whatever to any particular firm or copartnership business, is not sufficiently definite to put the defendant in contempt.<sup>221</sup>

**§ 4327. Injunction against publishing book.**

*Form No. 1057.*

From printing, publishing, selling, or exposing for sale, or causing or being in any way concerned in the printing, publishing, or selling, or exposing to sale, or otherwise disposing of any copies of [describe the book], or any other book purporting to be or to resemble the book so printed, published, and sold by or for plaintiff.

<sup>218</sup> *Cowell v. Martin*, 43 Cal. 605.

<sup>219</sup> 2 Wat. Eden on Inj. 259; *People v. Vanderbilt*, 26 N. Y. 287; S. C., 28 Id. 396; 84 Am. Dec. 351; 25 How. Pr. 139; *People v. Vanderbilt*, 38 Barb. 282.

<sup>220</sup> *Ramsay v. Riddle*, 1 Cranch C. C. 399.

<sup>221</sup> *Moat v. Holbein*, 2 Edw. Ch. 188; consult, also, *Smith v. Jeyes*, 4 Beav. 503; 4 Sandf. 716; 8 Ves. 317; *Hall v. Hall*, 12 Beav. 414; *Whittaker v. Howe*, 3 Id. 388; *Miles v. Thomas*, 9 Sim. 609; 4 Abb. Pr. 394.

§ 4328. **Injunctions against publications.** Although an account of profits may be decreed to the owner of a copyright, as incidental to the relief by injunction, it must be prayed for in the bill. It can not be decreed if the bill contains neither a prayer for an account nor for general relief.<sup>222</sup> Publication of legal proceedings can not be restrained by injunction.<sup>223</sup> So also publication of a libel can not be restrained,<sup>224</sup> as chancery has no jurisdiction to restrain the publication of a libel, as such, even if it is injurious to property.<sup>225</sup> Nor will the publication of a threatened libel be enjoined.<sup>226</sup> The publication of a manuscript or any substantial part thereof, without the author's consent, may be enjoined.<sup>227</sup> Thus, the publication of private letters, without the writer's consent, may be restrained.<sup>228</sup>

§ 4329. **Against publishing private letter.**

*Form No. 1058.*

From printing, publishing, selling, or causing to be sold or exposed for sale, or circulating, or in any manner, either by writing or otherwise, making public a letter written by ....., on or about the ..... day of ....., 18.., and forwarded to ....., at ....., or any part thereof [or for a number of letters written by A. B. to C. D., between the ..... day of ....., 18.., and the ..... day of ....., 18..].

<sup>222</sup> Baily v. Taylor, 1 Russ. & M. 73; Colburn v. Simms, 2 Hare, 550; Stevens v. Cady, 2 Curtis C. C. 200.

<sup>223</sup> Wood v. Marvinne, 3 Duer, 674.

<sup>224</sup> Brandreth v. Lance, 8 Paige, 24; 34 Am. Dec. 368.

<sup>225</sup> Prudential Assurance Co. v. Knott, L. R., 10 Ch. App. 142.

<sup>226</sup> Clay v. Marriott, Cal. Sup. Ct., July Term, 1878; see, also, Boston Diatype Co. v. Florence Manufacturing Co., 114 Mass. 69; 19 Am. Rep. 310; Singer, etc., Co. v. Domestic, etc., Co., 49 Ga. 70; 15 Am. Rep. 674; Celluloid Manufacturing Co. v. Goodyear, etc., Co., 13 Blatchf. 375; Life Assoc. v. Boogher, 3 Mo. App. 173; Mayer v. Stonecutters Assoc., 47 N. J. Eq. 519; Kidd v. Henry, 28 Fed. Rep. 773; compare MacKenzie v. Springs Co., 27 Abb. N. C. 402. As to publication of apology alleged to have been obtained by duress, see Fisher & Co. v. Apollinaris Co., L. R., 10 Ch. App. 297.

<sup>227</sup> Bartlett v. Crittenden, 5 McLean, 32.

<sup>228</sup> Id. As to restraining publication, see Woolsey v. Judd, 4 Duer, 385; S. C., 11 How. Pr. 49, and other cases there cited; Prince Albert v. Strange, 1 Mac. & G. 25; Gretton v. Haward, 2 Swanst. 424; Thompson v. Stanhope, Amb. 737; Pope v. Cerol, 2 Atk. 342; Prince Albert v. Strange, 1 Hall & Tw. 1, 28; see "Trade-mark," *post*.

§ 4330. **Attorney-at-law.** An attorney who has appeared for one party in a cause may be enjoined from appearing for the other party, and from communicating any knowledge which the confidence of his relation had been given.<sup>229</sup> This is certainly law as well as good morals, but it is feared that even a restraining order would not succeed in keeping those who desired to from divulging facts within their knowledge. It would seem a motion for such an injunction may be made in the course of such action, without commencing a new action against the attorney.<sup>230</sup>

§ 4331. **Against use of secret in trade.**

*Form No. 1059.*

From selling, or causing or procuring to be sold, under the title and designation of "Walker's Vinegar Bitters," any medicine made or manufactured by the defendant, or by or under his order or direction; and from making or compounding any medicines according to the secret in the complaint mentioned, etc., and from in any manner using the secret of compounding the said medicines, or any part thereof.<sup>231</sup>

§ 4332. **Property held in trust.** Where a specific article, or a specific sum of money, is held in trust for plaintiff by defendant, the court will enjoin the latter from disposing of or removing it, as a breach of trust, how ample soever the pecuniary responsibility of the defendant may be.<sup>232</sup> It is aptly said by the court in the following case that as it presents an element of trust, it is so peculiarly equitable in its nature that an injunction will be granted under circumstances which but for the element of trust would be entirely insufficient. So a court will not restrain the publication of a secret communicated under a contract not to reveal it, but it will certainly enjoin the same if acquired surreptitiously and in breach of confidence.<sup>233</sup> A *cestui que trust* may maintain a bill for an injunction against his trustee, to prevent his collecting, appropriating, or disposing of the trust property improperly.<sup>234</sup> An injunction may be

<sup>229</sup> *Cholmondeley v. Clinton*, 19 Ves. 261.

<sup>230</sup> *Id.*

<sup>231</sup> A similar form will be found in *Morison v. Moat*, 9 Hare (41 Eng. Ch.) 241.

<sup>232</sup> *Merritt v. Thompson*, 3 E. D. Smith, 296.

<sup>233</sup> *Yovatt v. Winward*, 1 Jac. & W. 394.

<sup>234</sup> *St. Luke's Hospital v. Barclay*, 3 Blatchf. 259.

granted to restrain two or three trustees of a private trust from making a contract to the prejudice of one of their *cestuis que trust*, and to their profit, without the assent of the third trustee — he being the representative of the *cestui que trust* who will be prejudiced by such contract.<sup>235</sup>

§ 4333. **Publication of a secret**, although in violation of a contract, can not be restrained,<sup>236</sup> unless obtained through surreptitious means, when it may be.<sup>237</sup> And where defendant had been in the confidential employ of plaintiff, and had taken extracts from his books and papers, and afterwards threatened to publish the same, he was not only enjoined from so doing, but also from keeping any copies of such extracts in his possession.<sup>238</sup>

§ 4334. **Against public officers — quo warranto, from usurping office.**

*Form No. 1060.*

From usurping, taking possession of, interfering with, or in any manner disturbing the plaintiff in the use, enjoyment, advantages, or benefits of [describe office], and from taking the fees or emoluments of said office, and from doing any act under or by the name of said office.

§ 4335. **Abuse of process.** The United States Circuit Court has jurisdiction in equity on bill or petition filed, and proper case made, to restrain the use of its process by the marshal in a manner contrary to law.<sup>239</sup>

§ 4336. **Irregular assessment.** The fact that the assessment for state and county taxes for 1855-1856, in San Francisco county, was not based on the valuation of the city assessor, as required by the act creating the board of supervisors, passed in 1851, is not a sufficient ground for an injunction upon the collection of the taxes, as the party could have appealed to the board of equalization if aggrieved.<sup>240</sup> Where an assessment and sale for taxes would be void, and the matters making them

<sup>235</sup> *Sloo v. Law*, 3 Blatchf. 459.

<sup>236</sup> *Deming v. Chapman*, 11 How. Pr. 384; *Jones v. Jones*, 3 Meriv. 160; *Newbery v. James*, 2 id. 450.

<sup>237</sup> *Yovatt v. Winyard*, 1 Jac. & W. 394.

<sup>238</sup> *Evitt v. Price*, 1 Sim. 483.

<sup>239</sup> *Gibbs v. Usher*, 1 Holmes, 348.

<sup>240</sup> *Merrill v. Gorham*, 6 Cal. 41.



void do not appear on the face of the tax collector's deed, but must be shown by extrinsic proof, and the deed upon its face would be *prima facie* valid, injunction lies to restrain the sale.<sup>241</sup> An individual whose property is assessed without authority from a municipal corporation, for a local improvement, may maintain an action to enjoin its collection, not only on the ground of avoiding a multiplicity of suits, but also to remove the cloud on the title;<sup>242</sup> and the objection that all persons united in interest are not joined as plaintiffs is waived if not set up by the pleading.<sup>243</sup>

§ 4337. **Against taking office.** An injunction does not issue to restrain a party from taking possession of an office and its books and papers under color of title thereto.<sup>244</sup> Nor will injunction issue at the instance of one who claims an office under an election by the people, to restrain the payment of the salary to the incumbent, pending the trial of a contest of the right to the office, unless the bill shows that an action at law for the salary received by the incumbent would be abortive.<sup>245</sup> Injunction against public officers by their individual names would not bind their successors or the public.<sup>246</sup>

§ 4338. **Taxes and assessments.** In all cases involving simply the question of taxation, the issue is strictly one at common law, and courts of equity can take no cognizance thereof; and

<sup>241</sup> Burr v. Hunt, 18 Cal. 303.

<sup>242</sup> Heywood v. City of Buffalo, 14 N. Y. 534; see, also, Farrington v. Investment Co., 1 N. Dak. 102; Valle v. Zigler, 84 Mo. 214; Dalton v. East Portland, 11 Oreg. 426; Allen v. Railroad Co., 114 U. S. 311.

<sup>243</sup> Ireland v. City of Rochester, 51 Barb. 414.

<sup>244</sup> Coulter v. Murray, 15 Abb. Pr. (N. S.) 129; and see Huels v. Hahn, 75 Wis. 468; Kilpatrick v. Smith, 77 Va. 347.

<sup>245</sup> Colton v. Price, 50 Ala. 424.

<sup>246</sup> Magee v. Cutler, 43 Barb. 239. As to injunction against officers generally, restraining them from acting, see Hartwell v. Armstrong, 19 Barb. 175; Thompson v. The Comm'rs, etc., 2 Abb. Pr. 251; Fitzpatrick v. Flagg, 5 id. 213; Lewis v. Oliver, 4 id. 121, 336; Phoenix v. The Comm'rs, etc., 1 id. 466; Vanderwerken v. N. Y. & N. H. R. R. Co., 6 id. 296; Fuller v. Allen, 7 id. 12; Gillespie v. Broas, 23 Barb. 370; Leigh v. Westervelt, 2 Duer, 618; Smart v. Hart, 75 Wis. 471; Pennoyer v. McConnaughy, 140 U. S. 1. Official discretion can not be controlled by injunction. McWhorter v. Railroad Co., 24 Fla. 417; 12 Am. St. Rep. 220. As to officers of corporations, see Bostock v. North Staffordshire R. R. Co., 3 Sm. & G. 283; 19 Eng. L. & Eq. 307; Moses v. Tompkins, 84 Ala. 613; see, also, Cal. Code Civ. Pro., § 531.

in such case, to grant an injunction is error.<sup>247</sup> *Quaere*, whether a taxpayer can interfere by injunction to restrain the performance of a ministerial duty cast upon public officers by law, merely upon the ground that the effect at some future time, if certain other things be done, might be to subject his property to taxation.<sup>248</sup> An injunction will not lie to restrain the collection of taxes due on property, unless it be shown that the injury resulting from the collection to the owner would be irreparable. An averment of this character must appear in the bill, and if denied, it must be sustained at the hearing.<sup>249</sup> The collection of a tax, even though illegal, if attempted to be collected by legal officers, can not be restrained by injunction.<sup>250</sup> And the same is held in the case of an assessment by local authorities.<sup>251</sup> Nor is interference proper on the ground that the officials who imposed the assessment were legally disqualified from holding office.<sup>252</sup> But the United States Supreme Court has enjoined the collection of an unconstitutional tax.<sup>253</sup> A court will not restrain a sale for taxes, when it is apparent upon the face of the proceedings, upon which the purchaser must rely to make out a *prima facie* case to enable him to recover under the sale, that the sale would be void.<sup>254</sup>

<sup>247</sup> *Minturn v. Hayes*, 2 Cal. 590; 56 Am. Dec. 366.

<sup>248</sup> *Pattison v. Board of Supervisors of Yuba County*, 13 Cal. 175.

<sup>249</sup> *Ritter v. Patch*, 12 Cal. 298; see, also, *Shelton v. Platt*, 139 U. S. 591; *Dean v. Davis*, 51 Cal. 407.

<sup>250</sup> So held in *Wilson v. Mayor of New York*, 1 Abb. Pr. 4; *Chemical Bank v. Mayor of New York*, id. 79; *N. Y. Life Ins. Co. v. Supervisors of New York*, id. 250; S. C., 4 Duer, 192; *Dodd v. City of Hartford*, 25 Conn. 237; and on the same subject the following cases: *Wells, Fargo & Co. v. Dayton*, 11 Nev. 161; *Nunda v. Crystal Lake*, 79 Ill. 311; *Hagenbuch v. Howard*, 34 Mich. 1; *R. G. R. R. Co. v. Scanlan*, 44 Tex. 649; and *State R. R. Tax Cases*, 92 U. S. 575.

<sup>251</sup> *Heywood v. City of Buffalo*, 14 N. Y. 534; *Blake v. City of Brooklyn*, 26 Barb. 301; *Bowton v. City of Brooklyn*, 15 id. 375; *Mayor, etc. v. Meserole*, 26 Wend. 132; *Sayre v. Tompkins*, 23 Mo. 443; see *Burnet v. Cincinnati*, 3 Ohio, 73; 17 Am. Dec. 582; *Culbertson v. Cincinnati*, 16 Ohio, 574; *Jones v. Cincinnati*, 18 id. 318; *McCoy v. Cincinnati*, 3 id. 370; 17 Am. Dec. 607; *Osborn v. Bank of United States*, 9 Wheat. 738; *De Baun v. The Mayor*, 16 Barb. 392; *Wilson v. The Mayor, etc.*, 4 E. D. Smith, 675; *Mutual Benefit Life Ins. Co. v. Board of Supervisors*, 9 Bosw. 683; *Susquehanna Bank v. Supervisors of Broome*, 25 N. Y. 312; but see *Foote v. Linck*, 5 McLean, 616; *Woolsey v. Dodge*, 6 id. 142.

<sup>252</sup> *Thatcher v. Dusenbury*, 9 How. Pr. 32.

<sup>253</sup> *Dodge v. Woolsey*, 18 How. (U. S.) 340.

<sup>254</sup> *Bucknall v. Story*, 36 Cal. 67.

A bill in equity will lie to restrain a sale of property for illegal taxes, since a tax deed is made *prima facie* evidence of title;<sup>255</sup> or the sale of real property under an illegal assessment.<sup>256</sup> Where an assessment is laid upon land in the city of San Francisco, it is not within the province of a court to interfere and order a sale of the land by a decree rendered in an injunction suit, instituted by the owner of the land for the purpose of preventing a sale under an ordinance of the city.<sup>257</sup> It seems that if the injunction bill had been filed before the work was commenced, the court would have felt bound to inquire into the regularity of the assessment.<sup>258</sup>

§ 4339. **When injunction will and will not lie.** An injunction may be issued to restrain public officers from proceedings taken under an unconstitutional statute which involves the imprisonment of the plaintiff.<sup>259</sup> That portion of an act prescribing that no injunction shall be issued against the commissioners appointed for the sale of the state interest within the water-line is invalid.<sup>260</sup> An injunction restraining the city officers from making payment of sums for which the city is liable can not be sustained.<sup>261</sup> Nor will the court restrain public officers from issuing bonds authorized by law, upon apprehension that the public officer will misapply their avails.<sup>262</sup> Nor will an injunction be granted to restrain a board of supervisors from incurring liabilities which are not a legal charge against a county.<sup>263</sup>

<sup>255</sup> Palmer v. Boling, 8 Cal. 388; Fremont v. Boling, 11 id. 387; and see Axtell v. Gerlach, 67 id. 483; but see Robinson v. Gaar, 6 id. 275.

<sup>256</sup> See Heywood v. City of Buffalo, 14 N. Y. 545; Van Doren v. Mayor of New York, 9 Paige Ch. 390.

<sup>257</sup> Weber v. The City of San Francisco, 1 Cal. 455.

<sup>258</sup> Id.

<sup>259</sup> Holt v. Commissioners of Excise, 31 How. Pr. 334. Or if such proceedings would work irreparable damage and mischief to the plaintiff's property rights. Pennoyer v. McConnaughy, 140 U. S. 1.

<sup>260</sup> Guy v. Hermance, 5 Cal. 73; 63 Am. Dec. 85; Stone v. Elkins, 24 Cal. 127.

<sup>261</sup> Hecker v. Mayor of New York, 18 Abb. Pr. 369; S. C., 28 How. Pr. 211.

<sup>262</sup> Faulkner v. Metcalf, 43 Barb. 255.

<sup>263</sup> Linden v. Case, 46 Cal. 171; see, also, People v. Canal Board of New York, 55 N. Y. 390; Dunham v. Village of Hyde Park, 75 Ill. 371; and Brush v. City of Carbondale, 78 id. 74; also Cal. Code Civ. Pro., §§ 3422, 3423.

§ 4340. **Who can not be enjoined.** The government can not be enjoined.<sup>264</sup> The president can not be enjoined;<sup>265</sup> nor heads of United States departments.<sup>266</sup> In a case where the process of injunction can not reach the principal, who is the true source of the mischief, and in the case of a sovereign state exempt from all judicial process, an injunction may be awarded to restrain the agent who is to be made the instrument of the wrong. The privilege of the principal is not communicated to the agent.<sup>267</sup>

§ 4341. **In trespass — against undermining plaintiff's land.**

*Form No. 1061.*

From digging, undermining, excavating, or removing any soil from any land adjoining the plaintiff's premises [describing them], which shall cause the plaintiff's land, by reason of the removal of the said earth, to fall away or subside.<sup>268</sup>

§ 4342. **Discretion of court.** The granting and continuing of injunction in cases of alleged trespasses on land claimed by plaintiff, where the injury is likely to be irreparable, are to some extent matters of discretion, and this discretion should always be exercised in favor of the party most liable to be injured.<sup>269</sup> In the case of *Slade v. Sullivan*, 17 Cal. 102, the Supreme Court refused to interfere with the discretion of the court below, in denying an injunction sought by a settler upon public mineral lands, to protect his improvements — a dwelling-house, milkhouse, barn, garden, dam, etc.— against miners who were working the bed of a ravine a short distance in front of the house.

§ 4343. **Party-wall.** Where plaintiff's wall, laid on his own land, projects over the defendant's land, the court will not compel the defendant to desist from using it as a party-wall.<sup>270</sup>

<sup>264</sup> *Hill v. United States*, 9 How. (U. S.) 386; *United States v. McLemore*, 4 Id. 286.

<sup>265</sup> *Mississippi v. Johnson*, 4 Wall. 475.

<sup>266</sup> *Walker v. Smith*, 21 How. (U. S.) 579.

<sup>267</sup> *Osborn v. Bank of United States*, 9 Wheat. 738.

<sup>268</sup> See, as to form on this subject, *Farrand v. Marshall*, 19 Barb. 380.

<sup>269</sup> *Hicks v. Compton*, 18 Cal. 206. A trespass, as such, is not subject to the control of a court of equity by injunction. *Heaney v. Mining Co.*, 10 Mont. 590.

<sup>270</sup> *Guttenberger v. Woods*, 51 Cal. 523.

§ 4344. **Stopping work of mine.** If the plaintiffs permit the defendants to remain in possession of a mining claim several months, without interference, working it as their own, and expending large sums of money in developing it, a court of equity will require a very clear and strong showing to induce it to grant or entertain a preliminary injunction to stop the work.<sup>271</sup> When the title of the property is in dispute, the question whether the defendants are solvent and able to respond in damages forms an important element in passing upon an application for an injunction pending the litigation.<sup>272</sup>

§ 4345. **Tearing down fences.** When a complaint, in an action to restrain the commission of trespass, avers that the defendant has torn down the fences of plaintiff, and entered his close for the purpose of opening a private road across plaintiff's land, under a claim of right founded on an order of a board of supervisors laying out a road, and does not state that the right has been settled in an action at law, and that the defendant continues his acts after a court of law has decided against him, it does not state facts sufficient to constitute a cause of action.<sup>273</sup> Courts of equity may restrain the commission of a trespass about to be committed, by taking down fences and opening a road through the plaintiff's land, in pursuance of an order of the board of supervisors, prematurely made.<sup>274</sup> The threatened injury must be irreparable<sup>275</sup> and irremediable.<sup>276</sup> An allegation in the complaint that plaintiff was in possession of the land as owner when defendant entered is a sufficient statement of title in a suit for injunction to restrain trespass.<sup>277</sup>

§ 4346. **When injunction does and does not lie.** An injunction lies to restrain the persistent commission of trespasses, even of a mere personal nature, where they affect a corporate franchise.<sup>278</sup> And where the injury is in its nature a continuing one, and the remedy at law be by successive suits, and

<sup>271</sup> *Real del Monte Co. v. Pond*, 23 Cal. 82.

<sup>272</sup> *Id.*

<sup>273</sup> *Leach v. Day*, 27 Cal. 643.

<sup>274</sup> *Grigsby v. Burtnett*, 31 Cal. 406; *More v. Massini*, 32 *id.* 590.

<sup>275</sup> *Hart v. Mayor, etc.*, 9 Wend. 571; 24 Am. Dec. 165; *Jerome v. Ross*, 7 Johns. Ch. 315; 11 Am. Dec. 484; *Sixth Avenue R. R. Co. v. Kerr*, 28 How. Pr. 382; affirming S. C., 45 Barb. 138.

<sup>276</sup> *Spooner v. McConnell*, 1 McLean, 337.

<sup>277</sup> *Hicks v. Compton*, 18 Cal. 206.

<sup>278</sup> *Stage Horse Cases*, 15 Abb. Pr. (N. S.) 51.

an action for damages will be wholly inadequate to protect plaintiff's rights, he will not be put to his remedy at law.<sup>279</sup> In Indiana it is not necessary that the injury be irreparable; if it can not be fully compensated in damages, injunction will lie.<sup>280</sup> When the complaint alleged that in September 1849, plaintiff settled on a tract of land, "the same being public land of the United States;" that subsequently H., a foreigner, built a house on and occupied a portion of the tract, and now that H.'s executor is offering the same for sale, and plaintiff prays an injunction, and damages for the occupation, it was held that the plaintiff sets forth no principle on which to base a claim.<sup>281</sup> For an apprehended trespass, unless under very special circumstances, injunction will not be allowed.<sup>282</sup> Injunction can not be granted, however clear the original right may be, if the trespass be complete and perfect.<sup>283</sup> Nor will it be granted where the party complaining has a complete and adequate remedy at law.<sup>284</sup> And although equity may interfere in a case of trespass to prevent irreparable mischief and multiplicity of suits, still if the trespass be but fugitive and temporary, and adequate compensation can be had at law, no injunction should be granted.<sup>285</sup> Nor will a naked trespass be enjoined where no waste is committed.<sup>286</sup>

<sup>279</sup> *Shiner v. Morris Canal, etc., Co.*, 27 N. J. Eq. 364; *Smith v. Gardner*, 12 Oreg. 221; 53 Am. Rep. 342; *Lee v. Watson*, 15 Mont. 228; *Wheelock v. Noonan*, 108 N. Y. 179; *Tautlinger v. Sullivan*, 80 Iowa, 218.

<sup>280</sup> *Clarke v. Jeffersonville, etc., R. R. Co.*, 44 Ind. 248.

<sup>281</sup> *O'Conner v. Corbitt*, 3 Cal. 370.

<sup>282</sup> For examples as to circumstances which have been considered sufficient, see *Mayor of New York v. Conover*, 5 Abb. Pr. 178; and see generally, on this topic, *Marshall v. Peters*, 12 How. Pr. 218; *Akrill v. Selden*, 1 Barb. 317; *Schoonover v. Bright*, 24 W. Va. 698; *Lembeck v. Nye*, 47 Ohio St. 336; 21 Am. St. Rep. 828; *Bond v. Wool*, 107 N. C. 139; *Steamboat Co. v. Transportation Co.*, 28 Fla. 387; 29 Am. St. Rep. 258.

<sup>283</sup> *Moreland v. Richardson*, 22 Beav. 604; *Deere v. Guest*, 1 Myl. & Cr. 516; *Attorney-General v. N. J. R. R. Co.*, 2 Green Ch. 141; *Ewing v. Rourke*, 14 Oreg. 514; see *Perkins v. Warren*, 6 How. Pr. 348.

<sup>284</sup> *Leach v. Day*, 27 Cal. 643.

<sup>285</sup> *Minnig's Appeal*, 82 Penn. St. 373.

<sup>286</sup> *Nevada Co. & Sac. Canal Co. v. Kidd*, 37 Cal. 282. Repeated trespasses are not of themselves sufficient to justify the interference of a court of equity by injunction. *Mechanics' Foundry v. Ryall*, 62 Cal. 416. But if the defendants are doing and threaten

**§ 4347. Trademarks — from using plaintiff's trademark.**

*Form No. 1062.*

From selling, exposing for sale, or causing to be sold [state what], or any other article or thing with similar labels to the plaintiff's, as hereinafter described, or in like boxes, or with like or similar devices thereon, in any manner or by any means, so that the article so put up or sold will be taken for that which this plaintiff has hitherto put up and sold under the name and style and by the device, etc., of [describe device particularly].<sup>287</sup>

**§ 4348. Deceptive trademark.** Where a deception is practiced upon the public by one who uses or imitates the trademark of another, with a fraudulent intent, to recommend to purchasers an article similar in appearance to one already made and favorably known in the market, an injunction will be granted to restrain it.<sup>288</sup> A picture may be matter of trademark.<sup>289</sup>

to continue acts which will destroy the plaintiff's growing crops, and render valueless a number of acres of valuable land, it is a case of irreparable injury, and an injunction should issue. *Schneider v. Brown*, 85 Cal. 205. So, injunctions will be granted in favor of mines, to prevent the substance of the estate from being injured or carried away. *Allen v. Dunlap*, 24 Oreg. 229; *Merced Min. Co. v. Fremont*, 7 Cal. 317; and see *Hobbs v. Canal Co.*, 66 id. 161. So, a threatened act of a party which disturbs the possession of another, and which, if permitted to continue, would ripen into an easement, is sufficient to entitle the party disturbed to an injunction. *Walker v. Emerson*, 89 Cal. 456; *Learned v. Castle*, 78 id. 454. The complaint in an action to enjoin the commission of trespasses upon land is defective when the trespasses are pleaded in general allegations only. *Lake Co. v. Driver*, 9 Wash. St. 177. It must be shown how and why the trespasses will be irreparable in their nature. *Mechanics' Foundry v. Ryall*, 75 Cal. 601; *Watson v. Ferrell*, 34 W. Va. 406; see § 2078, *ante*.

<sup>287</sup> See Cal. Pol. Code, § 3199, and also notes and authorities, vol. 2, § 2827 *et seq.* For another form, see *Croft v. Day*, 7 Beav. 84.

<sup>288</sup> *Coffeen v. Brunton*, 4 McLean, 516; see, also, *Solis Cigar Co. v. Pozo*, 16 Col. 388; *Gesler v. Grieb*, 80 Wis. 21; *Priestley v. Adams*, 59 Hun, 380. A person coming into equity for an injunction to restrain the use of a trademark must come with clean hands and without any lack of truth in his own case, and can not enjoin a defendant from using a trademark which he himself is not, in equity or good conscience, entitled to use, and which contains a false representation calculated to deceive the public as to the manufacturer of the article and the place where it is manufactured. *Joseph v. Macowsky*, 96 Cal. 518.

<sup>289</sup> *Faulkinburg v. Lucy*, 35 Cal. 52; 95 Am. Dec. 76.



**§ 4349. Against infringement of sign.***Form No. 1063.*

From running, or in any manner using or causing to be used, for the conveyance of passengers, any omnibus having painted, stamped, printed, or written thereon the words or names, "London Conveyance," or "Original Conveyance Company," or any other names, words, or devices, painted, stamped, printed, or written thereon in such manner as to form or to be a colorable imitation of the names, words, and devices painted, stamped, printed, or written on the omnibuses of the plaintiffs.<sup>290</sup>

**§ 4350. Waste — affidavit to obtain order to restrain waste.***Form No. 1064.*

[TITLE.]

[VENUE.] .

A. B., the plaintiff above named, being duly sworn, says as follows:

I. This action is brought [state the object of the action], and all the allegations of said complaint are true to the knowledge of the deponent.

II. On or about the ..... day of the present month of ....., the defendant proceeded to cut and take off, and put up in cordwood, the wood and timber then growing and being on said premises, and has now cut and piled up on said premises, ready to be taken therefrom, as I am informed and believe, several hundred cords of said cordwood, of the value of .....dollars; and I further say that the said wood and timber so cut and corded is not required for the necessary reparation of any fences, buildings, or erections which were upon said premises at the time of the said sale, nor for the necessary firewood for the use of the family of the said .....; but, to the contrary thereof, I am informed and believe that the said defendant has made preparations to destroy the remaining wood and timber growing upon said premises, and continues daily to cut the same; and I am also informed and believe that the said defendant, together with one C. D., and others whose names are unknown to me, and to whom the said defendant has contracted or proposed to dispose of said wood, or a portion thereof, threaten to, and are actually proceeding, with their boatmen, cartmen, servants, and persons in their employ to take and remove and dispose of the said cord-

<sup>290</sup> This form was sustained in *Knott v. Morgan*, 2 Keen, 213.



wood, wood, and timber. I further say that the land so sold by me is valuable principally for the sake of said wood and timber, and that the destruction thereof, as aforesaid, is a permanent injury to the freehold. And the said defendants, after the removal of said wood, as I am informed and verily believe, intend to abandon said land when the said wood is so removed; and by such removal of said wood, the security for the amount yet due me on the purchase of said land will be lost and rendered of no value.

III. The defendant is wholly insolvent, and unable to answer the plaintiff in damages in the premises; and, as I verily believe, I will be left without remedy as to the timber already cut, unless the defendant is enjoined from removing or interfering with it.

§ 4351. *Affidavit, what should state.* It is not sufficient that the affidavit should allege that the injury will be irreparable; it must be shown to the court how and why it would be so, otherwise the extraordinary remedy of injunction will not be allowed, especially where no action has ever determined the plaintiff's right.<sup>291</sup> On a motion for injunction to enjoin waste, the complainant can not, on bill and answer, read affidavits in support of his title.<sup>292</sup>

§ 4352. *Statement on motion enjoining waste.*

*Form No. 1065.*

From pulling down or otherwise injuring the buildings standing on the premises hereinafter described, or any part

<sup>291</sup> *Waldron v. Marsh*, 5 Cal. 119. Suit will lie for an injunction to stay waste, threatened or being committed. *Sheridan v. McMullen*, 12 Oreg. 150. Where relief is sought for the purpose of preserving the security of a mortgage equity will interpose by injunction to stay waste. *Mitchell v. Canal Co.*, 75 Cal. 464. Entry upon land and digging up and removing fruit trees growing upon it is waste, and an injury to the inheritance, and are acts which a court of equity may enjoin. *Silva v. Garcia*, 65 Cal. 591; *Duncome v. Felt*, 81 Mich. 333; see § 2811, *ante*. When an injunction is sought to restrain irreparable injury to the inheritance, from a trespass threatened in the nature of waste, the complaint need not allege the insolvency of the defendant. *Crescent, etc., Co. v. Simpson*, 77 Cal. 286.

<sup>292</sup> *United States v. Parrott*, 1 McAll. 271. On application for injunction to restrain waste, or mischief analogous to waste, the plaintiff may read affidavits contradicting the answer upon all the matters in controversy, including questions of title. *Hicks v. Michael*, 15 Cal. 107.

thereof, or from committing any waste, spoil, or destruction upon the said premises, and removing the fences therefrom, or destroying or cutting down the timber thereon, and from executing and procuring to be executed any conveyance of the said premises to any person or persons other than to the plaintiff, or as he shall direct.

The said premises are known as . . . . ., and are bounded and described as follows [description].

**§ 4353. Removal of building.** An injunction will not be granted at the suit of the landlord to restrain the tenant from removing from the demised premises a building erected by him, if it appears that the security for the rent will thereby be merely impaired and lessened in value. It must appear that such security will be left inadequate to secure the rent.<sup>293</sup>

**§ 4354. Removal of machinery.** Equity has undoubted jurisdiction to interfere by injunction in favor of the owner of the reversion to stay or prevent waste threatened or being committed by tenant for life or years; and where it appears that certain machinery, belonging to plaintiff and part of his mill property, was about to be removed by defendants, who were tenants in possession, to the great and irreparable injury of plaintiff and his property, it was held sufficient to warrant an injunction, without alleging the insolvency of defendants.<sup>294</sup>

**§ 4355. Against waste by cutting timber.**

*Form No. 1066.*

From cutting down, felling, barking, or otherwise wasting or injuring any timber trees, and from felling, digging up, or removing any ornamental trees therein, or underwood standing and growing on [designate the premises], and from committing any further or other waste or spoil in or upon the said land and premises.

**§ 4356. Timber already cut.** In an action for waste in cutting timber, it may be questionable whether injunction is proper as to timber already cut, but the court may require the defendant (having acquired jurisdiction) to give security to account as a condition of modifying the injunction in this respect.<sup>295</sup>

<sup>293</sup> *Perrine v. Marsden*, 34 Cal. 14.

<sup>294</sup> *Poertner v. Russel*, 33 Wis. 193; and see *Crescent, etc., Co. v. Simpson*, 77 Cal. 286.

<sup>295</sup> *Weatherby v. Wood*, 29 How. Pr. 404.

§ 4357. **When issued.** Injunctions to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity, or when the subject-matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. But in all cases where the right is doubtful, the court should direct a trial at law, and in the meantime grant a temporary injunction to restrain all injurious proceedings if there be danger of irreparable mischief.<sup>296</sup>

§ 4358. **Against destroying ornamental trees.**

*Form No. 1067.*

From committing waste, spoil, or destruction on [designate the premises], and from cutting down any timber or other trees growing upon the said estate, which are planted or growing there for the ornament of the said house, or which grow in lines, walks, vistas, or otherwise for the ornament of said houses, or of the gardens, parks, or pleasure-grounds thereunto belonging; and also to restrain him, his servants, workmen, and agents, from cutting down any timber or other trees, and from changing or removing the walks or drives therein, or widening or moving the same.

§ 4359. **Injury irreparable.** Plaintiff takes up two hundred and twelve acres of land under the Possessory Act of this state, incloses it, and plants it with fruit and ornamental trees and shrubbery. Defendants enter upon a portion of the tract for mining purposes, dig up and destroy the trees and shrubbery, and threaten to continue such trespasses — claiming the right so to do by paying to plaintiff the money value of the trees, etc. Plaintiff sued for damages for the trespasses committed, and asks a perpetual injunction against future trespasses. Verdict: “We, the jury, award the plaintiff forty-two dollars damages.” Judgment accordingly, the court refusing to perpetuate the injunction. Plaintiff had recovered a similar verdict in a previous suit; it was held that the verdict is conclusive of the rights of the parties, and that perpetual injunction against the trespasses should issue; that the nature of the property destroyed, and threatened to be destroyed, is such that the injury is irreparable; that plaintiff is not bound to take the mere money value of the trees, as they may possess a peculiar value to him.<sup>297</sup>

<sup>296</sup> Hicks v. Michael, 15 Cal. 107.

<sup>297</sup> Daubenspeck v. Grear, 18 Cal. 443.

**§ 4360. Against working a mine.**

*Form No. 1068.*

From working the ledges, veins, spurs, angles, or seams of gold, silver, copper, or iron, and other minerals lying in, upon, or under the [designate lands], and from digging, extracting, getting, and carrying away or selling or disposing of the gold, silver, copper, iron, and other minerals produced therefrom, or from mining any quartz or other rock which contains the same.

**§ 4361. Mining claim.** When the title to a mining claim is in controversy, an injunction may be granted to preserve the property pending the litigation.<sup>298</sup>

**§ 4362. Mortgagee, when entitled to.** Where mortgagor in possession threatens waste which involves irreparable injury to the land, and will render the security inadequate, the mortgagee is entitled to an injunction to stay waste without alleging the insolvency of the mortgagor.<sup>299</sup>

**§ 4363. Appeal from order.** An appeal from an order refusing to grant an injunction upon such hearing, or from an order dissolving an injunction, does not create an injunction or prolong the restraining order in the former case, nor revive it in the latter, pending the appeal.<sup>300</sup> An injunction is not dissolved or superseded by appeal taken.<sup>301</sup> So a pendency of motion for new trial does not operate as a suspension of an injunction.<sup>302</sup>

**§ 4364. Bonds given.** The usual bond being given, an order was made to show cause (August 29th) why an injunction should not issue. A restraining order in the "meantime" issued. The case was continued until October 10th, when, on hearing, the order was dissolved, injunction denied, and suit dismissed. Action on the bond; it was held that the restraining order embraces the time between its issuance and the hearing, and the damages may be had beyond August 29th.<sup>303</sup> Even if a chancellor has no power, under the statute, to require an un-

<sup>298</sup> Hess v. Winder, 34 Cal. 270.

<sup>299</sup> Fairbank v. Cudworth, 33 Wis. 358; Mitchell v. Canal Co., 75 Cal. 464.

<sup>300</sup> Hicks v. Michael, 15 Cal. 107.

<sup>301</sup> Merced Mining Co. v. Fremont, 7 Cal. 130.

<sup>302</sup> Ortman v. Dixon, 9 Cal. 23.

<sup>303</sup> Prader v. Grim, 13 Cal. 585.

dertaking upon the issuance of the restraining order, still having taken jurisdiction of the general subject of litigation, he has power aside from the statute to order such undertaking, or to make any other order in the progress of the case for the furtherance of the objects of the litigation and the protection of its subject-matter.<sup>304</sup>

**§ 4365. Hearing.** If the court or judge deem it proper that the defendant, or any of several defendants, should be heard before granting the injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained.<sup>305</sup>

**§ 4366. Order to show cause.** The object of the practice of issuing an order to show cause before granting the injunction is to enable the parties to present the case on the merits.<sup>306</sup> Where an order is made to show cause why an injunction should not be granted, and restraining defendants until the hearing, and on the hearing upon the order the injunction is refused, the restraining order expires by limitation.<sup>307</sup> In a California case it was held that the temporary injunction granted on filing the complaint should not have been dissolved before the hearing; that on the facts stated in the complaint, an action for damages would be fruitless; that although the complaint does not aver absolute insolvency of defendants, still enough is averred to satisfy the court that a judgment for damages would be worthless, and hence the injunction ought to have been continued.<sup>308</sup>

**§ 4367. Injunction order after order to show cause.**

*Form No. 1069.*

[TITLE.]

On the return of the order to show cause made by me in the above-entitled action, on the ..... day of ....., 18.., and returnable this day, after hearing E. F. for the plain-

<sup>304</sup> *Prader v. Purkett*, 13 Cal. 588; see § 4236, *ante*.

<sup>305</sup> Cal. Code Civ. Pro., § 530; N. Y. Code, § 609.

<sup>306</sup> *Hicks v. Michael*, 15 Cal. 107.

<sup>307</sup> *Id.*; see § 4243, *ante*. In an action for an injunction the force of a restraining order previously issued ceases upon the granting of an injunction *pendente lite*. *Cohen v. Gray*, 70 Cal. 85; see *Sheward v. Water Co.*, 90 *id.* 635; *Walker v. Emerson*, 89 *id.* 456.

<sup>308</sup> *Hicks v. Compton*, 18 Cal. 206.

tiff, and G. H. for the defendant, no sufficient cause to the contrary being shown:

It is ordered that the said order to show cause be, and the same hereby is, made absolute, on the said plaintiff executing and filing a written undertaking pursuant to the statute and the practice of the court, to the effect that he will pay the said defendant such damages, not exceeding the sum of ..... dollars, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff is not entitled thereto. And I order that the said defendant, and his agents and servants, be enjoined and restrained [state acts to be enjoined] until the further order of the court.<sup>309</sup>

[DATE.]

[SIGNATURE.]

§ 4368. **Insufficient grounds.** In a bill for an injunction to restrain defendants from taking possession of certain real estate — a warehouse and wharf — the complaint averred plaintiff's title to the property, and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises; and that unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property be destroyed; it was held that these allegations are insufficient to authorize an injunction, there being no averment of insolvency of defendants, and the complaint not showing that there is no adequate remedy at law.<sup>310</sup> The answer in chancery of a corporate body under its common seal, denying the equity of the bill, is sufficient to warrant a denial of an injunction, or to dissolve it if granted.<sup>311</sup> A mere denial in the answer of the equity of the bill will not prevent the court

<sup>309</sup> It will be readily observed by the practitioner that the language of each restraining order is necessarily changed according to the facts of each case, and the object being to inform the party against whom the order runs, in clear and unmistakable terms, what he is forbidden from doing, the briefer the order the clearer it will be; lengthy and wordy injunction orders should be avoided.

<sup>310</sup> Tomlinson v. Rubio, 16 Cal. 202.

<sup>311</sup> Haight v. Proprietors of the Morris Aqueduct, 4 Wash. C. C. 601.

from looking into the law and the facts of the case on a motion for a special injunction, and granting or refusing it, according to its discretion.<sup>312</sup>

§ 4369. **Form.** No particular form of order to restrain is necessary. The substantial thing is an authentic notification to the defendants of the mandate of the judge, which they must then, at their peril, obey.<sup>313</sup> \*The language should be so clear and explicit that an unlearned man can understand it, without employing counsel to advise him what he has a right to do;<sup>314</sup> and should contain sufficient to apprise the party what he is restrained from doing, though how far actual knowledge of its purpose on the part of the defendant may affect this, *quaere*.<sup>315</sup>

§ 4370. **Title to property.** There is no occasion that the plaintiff should first establish his title at law before he can obtain the injunction when the averment of his right in the complaint is admitted by demurrer.<sup>316</sup>

§ 4371. **To whom directed.** Though an injunction should not in general be directed to persons not parties to the action,<sup>317</sup> yet the defendant can not object to it on this ground.<sup>318</sup> But it is usual and proper to express that the agents, attorneys, and servants of the defendants are enjoined; whether they are named or not, they are bound by it, if they have notice of it.<sup>319</sup> It seems in New York the court will not enforce obedience of such an injunction on an *ex parte* application for an attachment;<sup>320</sup> and an injunction against persons not parties is operative only as a notice to such.<sup>321</sup>

<sup>312</sup> *Clum v. Brewer*, 2 Curtis C. C. 506.

<sup>313</sup> *Summers v. Farish*, 10 Cal. 347.

<sup>314</sup> *Laurie v. Laurie*, 9 Paige Ch. 234; *Clark v. Clark*, 25 Barb. 76.

<sup>315</sup> See *Sullivan v. Judah*, 4 Paige Ch. 444; *Byam v. Stevens*, 4 Edw. Ch. 119.

<sup>316</sup> *Tuolumne Water Co. v. Chapman*, 8 Cal. 392.

<sup>317</sup> *Iveson v. Harris*, 7 Ves. 257; *Fellows v. Fellows*, 4 Johns. Ch. 25; *Watson v. Fuller*, 9 How. Pr. 425; *People v. Judges of the New York Common Pleas*, 3 Abb. Pr. 181; *Bloomfield v. Snowden*, 2 Paige, 355; *Sage v. Quay*, Clarke, 347; *Edmonston v. McLoud*, 19 Barb. 361.

<sup>318</sup> *Tradesman's Bank v. Merritt*, 1 Paige. 304.

<sup>319</sup> *Mayor of New York v. Conover*, 5 Abb. Pr. 252; *Morton v. Superior Court*, 65 Cal. 496; *Golden Gate Con. Hy. M. Co. v. Superior Court*, 65 id. 187; see § 4261, *ante*.

<sup>320</sup> *Watson v. Fuller*, 9 How. Pr. 426.

<sup>321</sup> *Sage v. Quay*, Clarke, 348; *Edmonston v. McLoud*, 19 Barb. 361.



§ 4372. **When may be granted.** Granting and continuing injunctions rests very much in the sound discretion of the court, to be governed by the nature of the case;<sup>322</sup> and this discretion should always be exercised in favor of the party most liable to be injured.<sup>323</sup> The abuse of discretion in granting the writ of injunction should be guarded against.<sup>324</sup> An order or writ may be granted by the court in which the action is brought, or by a judge thereof, or by a county judge; and when made by a judge, may be enforced as the order of the court.<sup>325</sup>

§ 4373. **Service of injunction.** When granted on the complaint, a copy of the complaint and verification attached must be served with the injunction.<sup>326</sup> The statute of California points out no mode for service of an injunction; but it has been held in a recent case that the writ may be served by any person authorized to serve a summons; but in conformity with the provisions relative to the summons, delivery of a copy is essential to personal service where that is required; but whether it would be necessary to exhibit the original, unless specially requested by the party served, no opinion is here expressed.<sup>327</sup> When granted upon affidavit, a copy of the affidavit must be served with the injunction.<sup>328</sup> A writ placed in the sheriff's hands on Sunday can not be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired.<sup>329</sup> A party against whom an injunction has been issued is not bound to obey it until after due service thereof on him; giving him verbal notice that an order enjoining him has been made is not sufficient.<sup>330</sup> 'It seems if a party be in court at the time an injunction order is made, and thus has personal knowledge of the order, that he would be bound thereby.'<sup>331</sup> An injunction order, and due service thereof on

<sup>322</sup> Hicks v. Michael, 15 Cal. 107.

<sup>323</sup> Hicks v. Compton, 18 Cal. 206. Unless it appears that its discretion has been abused, the action of the trial court will not be disturbed on appeal. Grannis v. Lorden, 103 Cal. 472; White v. Nunan, 60 id. 406.

<sup>324</sup> De Witt v. Hays, 2 Cal. 463; 56 Am. Dec. 352.

<sup>325</sup> Cal. Code Civ. Pro., § 525; N. Y. Code, § 606.

<sup>326</sup> Id., § 527.

<sup>327</sup> Edmondson v. Mason, 16 Cal. 386.

<sup>328</sup> Cal. Code Civ. Pro., § 527.

<sup>329</sup> Whitney v. Butterfield, 13 Cal. 335; 73 Am. Dec. 584.

<sup>330</sup> Elliott v. Osborne, 1 Cal. 396.

<sup>331</sup> Id.



the party enjoined, do not operate to enlarge the time within which an act is required to be done by the party procuring the order.<sup>332</sup> Where the plaintiff in an injunction suit endeavored to entrap the defendant into a violation of the injunction, it was held that the plaintiff should be charged with the costs of an application for an attachment made by him.<sup>333</sup> An attachment for disobeying an injunction may be granted;<sup>334</sup> and the court may imprison for a contempt in violating an injunction.<sup>335</sup>

**§ 4374. Dissolving injunction — notice of motion to dissolve.**  
*Form No. 1070.*

[TITLE.]

To .....

Please take notice that on [designate papers], the undersigned will move the court at ....., on the ..... day of ....., 18.., at ..... o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the injunction issued in this action be dissolved; and for such other or further relief as may be just.

[DATE.]

[SIGNATURE.]

**§ 4375. Damage on dissolution.** Defendant may recover damages, though the court had no jurisdiction.<sup>336</sup> And the measure of damages is the value of the property.<sup>337</sup> Fees of counsel are properly included where they are a direct loss.<sup>338</sup> The fees of an attorney employed to resist injunction can not be recovered as damages, unless they have been paid. The fact that the plaintiff is subject to a liability to his attorney, without showing actual payment to him, is insufficient.<sup>339</sup> The plaintiff

<sup>332</sup> Elliott v. Osborne, 1 Cal. 396.

<sup>333</sup> Sparkman v. Higgins, 2 Blatchf. 29.

<sup>334</sup> Monroe v. Harkness, 1 Cranch C. C. 157.

<sup>335</sup> Monroe v. Bradley, 1 Cranch C. C. 158; see Cal. Code Civ. Pro., §§ 1212, 1218, 1219.

<sup>336</sup> Cumberland Coal Co. v. Hoffman Steam Coal Co., 39 Barb. 16; S. C., 15 Abb. Pr. 78.

<sup>337</sup> Barton v. Fisk, 30 N. Y. 166. In an action to recover the damages caused by the wrongful suing out of an injunction, a party can recover the value of his labor for the time he was compelled to remain idle by being restrained from working his mining ground. Campbell v. Metcalf, 1 Mont. 378; see, also, Lambert v. Haskins, 80 Cal. 611.

<sup>338</sup> Ah Thale v. Quan Wan, 3 Cal. 216; but see Taacks v. Schmidt, 18 Abb. Pr. 307.

<sup>339</sup> Willson v. McEvoy, 25 Cal. 170.

in an action on an injunction bond is not entitled to a judgment for damages for expenses incurred for attorney's fees and in procuring testimony, unless he proves that he has actually paid the attorney and the expenses of procuring testimony.<sup>340</sup> The usual bond being given, an order was made to show cause (August 29th) why an injunction should not issue. A restraining order in the "meantime" was issued. The case was continued until October 10th, when, on hearing, the order was dissolved, injunction denied, and suit dismissed. Action on the bond; it was held that the restraining order embraces the time between its issuance and the hearing, and that damages may be had beyond August 29th.<sup>341</sup> The form of an undertaking does not in terms provide for damages accruing after the preliminary order for an injunction has ceased to be operative, and the liability of sureties will not be extended by construction beyond the terms of the undertaking.<sup>342</sup>

<sup>340</sup> *Prader v. Grimm*, 28 Cal. 11; see, also, *Helena v. Brulo*, 15 Mont. 429; *Curtis v. Badman*, 110 Cal. 433; *Creek v. McManus*, 13 id. 152; *Olds v. Cary*, 13 Oreg. 362; *Cook v. Greenough*, 14 Mont. 352. Attorney fees are not recoverable in an action on an injunction bond where no motion for the dissolution of the injunction is made, and it is allowed to stand until defeated by a trial on the merits. *Donahue v. Johnson*, 9 Wash. St. 187. The undertaking in injunction does not cover counsel fees paid for the trial of the main issue, but only such as are paid for procuring the dissolution of an injunction improperly issued. *Parker v. Bond*, 5 Mont. 1; *Porter v. Hopkins*, 63 Cal. 53; *Curtiss v. Bachman*, 110 id. 433. The measure of damages is the actual expense and loss occasioned, excluding remote damages, and including all damages naturally and fairly traceable to the wrongful issuance of the injunction. *Rice v. Cook*, 92 Cal. 144; and see *Dougherty v. Dore*, 63 id. 170. Where the damages are limited by the terms of the bond to such as the plaintiff may sustain by reason of the injunction, whatever expenses he is subjected to by reason of the suit, or for counsel fees in defending the suit, are not damages within the terms of the bond. *Curtiss v. Bachman*, 110 Cal. 433; and see *San Diego Water Co. v. Steamship Co.*, 101 id. 216; *Sweet v. Mowry*, 71 Hun, 381; *Whiteside v. Cottage Assoc.*, 84 id. 555; *Randall v. Carpenter*, 88 N. Y. 293; *Thurston v. Haskell*, 81 Me. 303.

<sup>341</sup> *Prader v. Grim*, 13 Cal. 585.

<sup>342</sup> *Webber v. Wilcox*, 45 Cal. 302. The functions of a preliminary injunction cease when the final decree is made, and damages subsequently accrued can not be recovered from the sureties, although the final decree be reversed on appeal. *Lambert v. Haskell*, 80 Cal. 611.

§ 4376. **Defense in action on bond.** In an action for damages on an undertaking given on suing out an injunction, the defendants can not object, by way of defense, that they ought not to pay the damages which they contracted to pay, because the business which they enjoined, and for the stoppage of which damages are claimed, was a public nuisance.<sup>343</sup>

§ 4377. **Dismissal of suit.** A judgment dismissing a suit in which a temporary injunction had been granted for want of prosecution amounts to a determination by the court that the injunction was improperly granted; and after such judgment, suit lies upon the injunction bond.<sup>344</sup>

§ 4378. **Effect of answer.** Upon a motion to dissolve an injunction, an averment in an answer not responsive to any allegation in the bill is not *per se* evidence against the complainant. The answer of the defendant, in order to be evidence in his favor, must respond to a fact averred in the bill, and not to a mere inference of law.<sup>345</sup> If an answer denies the equities, it will be dissolved,<sup>346</sup> but without prejudice.<sup>347</sup> But it does not follow necessarily that the injunction should be dissolved in such case.<sup>348</sup> And the Supreme Court will not interfere, except in case of abuse of discretion.<sup>349</sup>

<sup>343</sup> *Cunningham v. Breed*, 4 Cal. 384. An answer in a suit on an injunction bond which pleads settlement of the original suit, which, by its terms, was limited to such controversies as then existed, is no defense to an action on the injunction bond, the cause of action upon which subsequently arose; and though a demurrer would be more appropriate as a means of testing its sufficiency, it is so clearly bad that a motion to strike it out is proper. *Silcox v. Lang*, 78 Cal. 118.

<sup>344</sup> *Dowling v. Polack*, 18 Cal. 625. The voluntary dismissal of an injunction suit by the plaintiff has the same effect as a decision of the court that he was not entitled to the injunction. *Asevado v. Orr*, 100 Cal. 293.

<sup>345</sup> *Merritt v. Brinkerhoff*, 17 Johns. 366; *Payne v. Coles*, 1 Mun. 373; *Page's Ex'r v. Winston's Adm'r*, 2 Id. 298; *Robinson v. Cathcart*, 2 Cranch C. C. 590; *United States v. Parrott*, 1 McAll. 271.

<sup>346</sup> *Hazard v. Hudson River Bridge Co.*, 27 How. Pr. 296.

<sup>347</sup> Id.

<sup>348</sup> *Carpenter v. Danforth*, 19 Abb. Pr. 225; *Bank of Monroe v. Schermerhorn, Clarke*, 300.

<sup>349</sup> *Godey v. Godey*, 39 Cal. 166; *McCreery v. Brown*, 42 Id. 457; *Rogers v. Tenant*, 45 Id. 186; see, also, *Fuhn v. Weber* 38 Id. 637.

§ 4379. **Effect of appeal.** An injunction is not dissolved or superseded by appeal taken.<sup>350</sup> So an appeal from an order dissolving an injunction does not prolong the restraining order.<sup>351</sup>

§ 4380. **Effect of dissolution.** The dissolution of an injunction is a technical breach of the injunction bond.<sup>352</sup> Where an injunction has been dissolved, and afterwards reinstated, and is still pending, no suit can be maintained on the injunction bond, as for a breach of it.<sup>353</sup>

§ 4381. **Grounds of dissolution.** If upon such application it satisfactorily appear that there is not sufficient ground for the injunction, it must be dissolved; or if it satisfactorily appear that the extent of the injunction is too great, it must be modified.<sup>354</sup> An injunction was dissolved on the grounds: 1. That the affidavit and papers on which it was granted were not legibly written; 2. That the injunction had not been served personally; 3. That the papers had not been filed.<sup>355</sup> The grounds of the injunction can not be inquired into in suit upon an injunction bond. The court in which the injunction suit is tried must determine whether the injunction was properly or improperly issued; and after such determination, and not before, does an action lie on the bond.<sup>356</sup>

§ 4382. **Injunction granted without notice.** If an injunction be granted without notice, the defendant, at any time before the trial, may apply, upon reasonable notice to the judge who granted the injunction, or to the court in which the action is brought, to dissolve or modify the same.<sup>357</sup> The motion may be made: 1. Upon the complaint and affidavits, or in other words, the papers, whatever they may have been, upon which the injunction was granted; or, 2. Upon papers upon which the injunction was granted, and affidavits on the part of defend-

<sup>350</sup> *Merced Mining Co. v. Fremont*, 7 Cal. 130.

<sup>351</sup> *Hicks v. Michael*, 15 Cal. 107.

<sup>352</sup> *Stone v. Cason*, 1 Oreg. 100.

<sup>353</sup> *Bentley v. Joslin*, Hempst. 218.

<sup>354</sup> Cal. Code Civ. Pro., § 533. A court that grants a preliminary injunction may, in the exercise of its judicial discretion, modify the injunction at any time before final judgment. *Hobbs v. Canal Co.*, 66 Cal. 161.

<sup>355</sup> *Johnson v. Casey*, 28 How. Pr. 492.

<sup>356</sup> *Dowling v. Polack*, 18 Cal. 625; see *Rice v. Cook*, 92 Cal. 144.

<sup>357</sup> Cal. Code Civ. Pro., § 532; but see *Id.*, § 937; and *Fremont v. Merced*, 9 Cal. 19; *Borland v. Thornton*, 12 *Id.* 441.

ant, with or without answer. If the defendant rests his motion upon the papers upon which the injunction is granted, the plaintiff can make no further showing, but must stand upon his complaint or his complaint and affidavits, as the case may be. If, however, the defendant makes a counter-showing by affidavit, with or without the answer, the plaintiff may meet it with a further showing on his part. If the defendant moves upon what he has prepared as his verified answer, he makes it an affidavit, in the sense of the statute, for all the purposes of his motion, and he can not deprive the plaintiff of his rights to reply by calling it an answer instead of an affidavit.<sup>358</sup> It is no ground for dissolving an injunction upon a motion made upon the complaint alone, if the facts alleged in the complaint are sufficient to entitle the plaintiff to an injunction.<sup>359</sup>

§ 4383. **Judgment, effect of.** When suit is brought to set aside a judgment on the ground of fraud, and a restraining order is issued in such suit at the instance of the plaintiff, and subsequently, at a final hearing, the court decides that such judgment was not fraudulent, but valid, it was held that the effect of such judgment is that plaintiff was not entitled to the restraining order.<sup>360</sup> Plaintiffs sue defendants for damages for their alleged trespasses upon a certain portion of quartz-mining claims, alleged in the complaint to be the property and in the possession of plaintiffs, asking an injunction against further trespasses, which was granted, the complaint averring the insolvency of defendants. The defendants deny all the allegations of the complaint, and claim ownership. The jury found, generally, "for defendants," and judgment was rendered in their favor for costs. Defendants then moved to amend the judgment by adding thereto the words "and that the injunction heretofore granted be and the same is hereby dissolved," which was refused; but the judgment was so modified as to permit defendants to work the surface diggings set up in their answer; it was held that the action amounted to an action of trespass, with an injunction as auxiliary thereto; and that the action itself having failed by the verdict for defendants, the injunction falls with it, and should have been dissolved.<sup>361</sup>

<sup>358</sup> Falkinburg v. Lucy, 35 Cal. 52; 95 Am. Dec. 76; Hiller v. Collins, 63 Cal. 235; Kahn v. Mining Co., 2 Utah, 16.

<sup>359</sup> Fuhn v. Weber, 38 Cal. 636.

<sup>360</sup> Heyman v. Landers, 12 Cal. 107.

<sup>361</sup> Brennan v. Gaston, 17 Cal. 372.

**§ 4384. Motion on complaint and answer.** Where a motion to dissolve an injunction is made upon bill and answer alone, the general rule is to dissolve the injunction, if the answer denies all the equities of the bill. There are exceptions to the rule, but they depend upon the special circumstances of the particular cases.<sup>362</sup> Where an injunction was granted on the complaint, restraining defendants from surveying or selling the premises pending suit, it was dissolved on filing an answer setting up paramount title in defendants; it was held that the injunction was properly dissolved, because the validity of defendants' title should be judicially determined before its assertion be enjoined.<sup>363</sup> Where the motion is made on complaint and answer, the answer will be treated as an affidavit, and the plaintiff is entitled to reply to the answer by affidavits.<sup>364</sup>

**§ 4385. Motion, when to be made.** The motion to dissolve is limited to cases where the injunction is originally granted without notice.<sup>365</sup> If the injunction is granted upon notice, the remedy is by appeal.<sup>366</sup>

**§ 4386. Notice.** Notice of a motion to dissolve an injunction must be given in a reasonable time before the motion is made, unless the cause has been set down for hearing of the motion.<sup>367</sup> Under ordinary circumstances, one day's notice is too brief; but there is no fixed limit as to time.<sup>368</sup>

<sup>362</sup> *Gardner v. Perkins*, 9 Cal. 553; *Johnson v. Wide West M. Co.*, 22 id. 479; *Burnett v. Whitesides*, 13 id. 156; *Real del Monte Co. v. Pond, etc., Co.*, 23 id. 82. When the complaint does not state a cause of action an order refusing to dissolve an injunction is erroneous for that reason; and if facts pertaining to the knowledge of the defendant, which are essential to the cause of action, are alleged upon information and belief in the complaint, and are positively denied under oath in the answer, the injunction should be dissolved. *County of Yuba v. Clarke*, 79 Cal. 239.

<sup>363</sup> *Curtis v. Sutter*, 15 Cal. 263.

<sup>364</sup> *Falkinburg v. Lucy*, 35 Cal. 52; 95 Am. Dec. 76; *Hiller v. Collins*, 63 Cal. 235.

<sup>365</sup> *Natoma Water & Mining Co. v. Clarkin*, 14 Cal. 551; *Natoma Water & Mining Co. v. Parker*, 16 id. 83.

<sup>366</sup> *Curtis v. Sutter*, 15 Cal. 265.

<sup>367</sup> *Wilkins v. Jordan*, 3 Wash. C. C. 226. What notice is required. See *Burford v. Ringgold*, 1 Cranch C. C. 253; *Ramsey v. Wilson*, id. 304; *Stoddert v. Waters*, id. 483.

<sup>368</sup> *Lawrence v. Bowman*, 1 McAll. 419. The Cal. Code Civ. Pro., § 532, uses the expression "reasonable notice." But see Id., § 1005, which provides what notice must be given of motions; and Id., § 937,

§ 4387. **New trial, effect of.** Pendency of motion for a new trial does not operate as a suspension to an injunction.<sup>369</sup> In an action to try the right to a mining claim, a preliminary injunction is granted on plaintiff's motion, and on appeal to the Supreme Court, a judgment in favor of plaintiff is reversed, and a new trial granted; this granting of a new trial does not entitle the defendant to a dissolution or modification of the injunction.<sup>370</sup>

§ 4388. **Reinstating.** Where an injunction has been dissolved on the coming in of the answer denying the equity of the bill, and testimony has afterwards been taken and published tending to show the right of the complainant to relief, the injunction or application may be reinstated.<sup>371</sup> When the judgment is reversed and the cause remanded for a new trial, it is returned to the lower court for a trial upon the issues, and it stands in the same attitude in all respects as before the former trial. If the plaintiffs were entitled to an injunction before the former trial, and the injunction was ordered, they were entitled to retain it upon the cause being remanded for a new trial.<sup>372</sup>

§ 4389. **Nonsuit, effect of.** When a preliminary injunction is granted on plaintiff's application, the injunction should be dissolved if a nonsuit is granted on the trial.<sup>373</sup> If a preliminary injunction is dissolved upon granting a nonsuit, and the judgment is afterwards reversed on appeal, the plaintiff, upon a proper application, will be entitled to a renewal of the injunction upon filing the *remittitur* in the court below.<sup>374</sup>

§ 4390. **Opposing motion.** If the application be made upon affidavits on the part of the defendant, but not otherwise, the which provides that an order made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge who made it; or may be vacated or modified upon notice, in the manner in which other motions are made. See *Hefflon v. Bowers*, 72 Cal. 270.

<sup>369</sup> *Ortman v. Dixon*, 9 Cal. 23.

<sup>370</sup> *Hess v. Winder*, 34 Cal. 270.

<sup>371</sup> *Fanning v. Dunham*, 4 Johns. Ch. 36; *Travers v. Stafford*, 2 Ves. sen. 19; *Radford's Ex'r v. Innes' Ex'x*, 1 Hen. & M. 8; *Tucker v. Carpenter*, Hempst. 440.

<sup>372</sup> *Hess v. Winder*, 34 Cal. 270.

<sup>373</sup> *Harris v. McGregor*, 29 Cal. 124.

<sup>374</sup> *Id.*



plaintiff may oppose the same by affidavits, or other evidence, in addition to those on which the injunction was granted.<sup>375</sup> On application for injunction to restrain waste, or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title.<sup>376</sup>

**§ 4391. Remedy of defendant.** An injunction bond, though given to all the obligees by name, and using no words directly expressing a several obligation, yet necessarily creates a several liability, the design of it being to secure each or all of the obligees from damages or injury.<sup>377</sup> An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of court through malice, and without probable cause.<sup>378</sup> If the act complained of is destitute of these elements, the remedy of the injured party is on the injunction bond.<sup>379</sup>

**§ 4392. Reversal of judgment.** A reversal of judgment, which judgment awards the plaintiff possession of a tract of land, and perpetually enjoins the defendant from committing waste on the land, also reverses the injunction decree, even if the decree is not included in the record sent to the appellate court.<sup>380</sup>

**§ 4393. Revival of injunction.** The court below may, on proper showing, revive an injunction once dissolved, or grant an injunction previously denied, and this is the extent of its power when the matter has been once disposed of.<sup>381</sup>

**§ 4394. Right to move.** The right to move to dissolve an injunction before final hearing exists only where it was granted without notice, according to section 118 of the Practice Act.<sup>382</sup>

<sup>375</sup> Code Civ. Pro., § 532.

<sup>376</sup> Hicks v. Michael, 15 Cal. 107.

<sup>377</sup> Summers v. Farish, 10 Cal. 347.

<sup>378</sup> Robinson v. Kellum, 6 Cal. 399.

<sup>379</sup> Id.; see, also, Asevado v. Orr, 100 Cal. 293; Ruble v. Mining Co., 10 Oreg. 39. Sufficiency of complaint in action upon injunction bond. See Curtiss v. Bachman, 84 Cal. 216; Asevado v. Orr, 100 id. 293.

<sup>380</sup> McGarrahan v. Maxwell, 28 Cal. 84.

<sup>381</sup> Hicks v. Michael, 15 Cal. 107; Creanor v. Nelson, 23 id. 464.

<sup>382</sup> Cal. Code Civ. Pro., § 532; Natoma Water & Mining Co. v. Parker, 16 Cal. 83.



The privilege of moving for a dissolution of an injunction upon the filing of an answer is limited to cases where the injunction is originally granted without notice. Where the injunction is granted on a rule to show cause, it can not be dissolved until the final hearing, unless the right to apply for dissolution on filing the answer be expressly reserved. An injunction granted upon an order to show cause, and after a full hearing on the merits, can not be dissolved on motion before the final hearing. The only remedy is to appeal from the order granting the injunction.<sup>383</sup>

**§ 4395. Street assessment.** Where assessment was laid for the purpose of improving a street, thereby benefiting the property of the plaintiff in common with the property of other persons owning lots on the same street, and the improvement was completed without the plaintiff interposing in the outset to prevent it, and he then filed an injunction bill to stay the sale of his land by virtue of an ordinance of the city, for the purpose of avoiding the payment of his portion of the assessment, it was held that the injunction ought to be dissolved, on the ground that he who asks equity must do equity; that the city should be permitted to proceed and sell the plaintiff's land for the purpose of satisfying the assessments, leaving him after the sale to the technical rights which he set up, by reason, as he claimed, of some irregularity in the mode of making the assessment.<sup>384</sup>

**§ 4396. When dissolved.** Where an injunction is granted until further answer and further order, which is the usual form, it is never dissolved until the answer comes in, even though the defendant should live abroad.<sup>385</sup> If there are several defendants, the court will not in general dissolve the injunction until all have answered.<sup>386</sup>

<sup>383</sup> Id.; see *Hefflon v. Bowers*, 72 Cal. 270.

<sup>384</sup> *Weber v. The City of San Francisco*, 1 Cal. 455; and see *Esterbrook v. O'Brien*, 98 Id. 671.

<sup>385</sup> *Read v. Consequa*, 4 Wash. C. C. 174.

<sup>386</sup> *Robinson v. Cathcart*, 2 Cranch C. C. 590. Where an injunction will be dissolved upon the coming in of an answer denying positively the equities of the bill, see *Orr v. Merrill*, 1 Woodb. & M. 376; *Orr v. Littlefield*, Id. 13; *United States v. Parrott*, 1 McAll. 271.

**§ 4397. Order dissolving injunction.***Form No. 1071.*

[TITLE.]

On reading and filing answer of defendant, and on motion of G. H., ccounsel for the defendant, and after hearing E. F., counsel for plaintiff, in opposition:

It is ordered that the injunction granted on the ..... day of ....., 18.., against the above-named C. D., be vacated and dissolved.

J. C.,

Judge of ..... County.

**§ 4398. Order confirming report as to damages.***Form No. 1072.*

[TITLE.]

On reading and filing the annexed notice of motion and affidavit and certificate, and the referee's report, and the evidence on which the same was founded, and on motion of G. H. for the defendants, and after hearing E. F. for plaintiffs, and for L. M. and N. O. (sureties), in opposition:

It is ordered that the said report of the referee herein be, and the same is hereby, in all respects confirmed, with ..... dollars of costs of this motion.

**§ 4399. Injunction dissolved and action dismissed.***Form No. 1073.*

[TITLE.]

And now comes as well the said plaintiff (by his attorney) as the said defendant (by his attorney), and thereupon this action came on for trial before the court upon the issues joined between the parties, on consideration whereof the court does find that the said defendant [here state the finding of the court on the issues presented in the pleadings] was not guilty of the waste and destruction in manner and form as the said plaintiff hath in his said complaint declared against him, or in any manner, or at all. It is, therefore, considered that the injunction heretofore granted in this action be, and the same is hereby dissolved; and it is further considered that the said defendant recover against the said plaintiff his costs in and about his suit, in this behalf expended, taxed to be ..... dollars.

## § 4400. Injunction made perpetual.

*Form No. 1074.*

[TITLE.]

And now comes as well the said plaintiff (by his attorney) as the said defendant (by his attorney), and thereupon this action came on for trial before the court, upon the issues joined between the parties; on consideration whereof, the court do find that the said defendant was guilty of the waste and destruction, in manner and form as the said plaintiff hath in his said complaint alleged against him.

It is, therefore, ordered and adjudged that the injunction heretofore granted in this action be, and the same is hereby, made perpetual, and the said defendant is hereby perpetually enjoined from [here state the act or acts complained of, with particularity, and from the doing of which the defendant is to be enjoined]; and it is further considered that the said plaintiff recover against the said defendant his costs in and about his suit, in this behalf expended, taxed to be ..... dollars.

## PART EIGHTH.

### PROCEEDINGS COLLATERAL AND INCIDENTAL TO ACTIONS.

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#### CHAPTER I.

##### NOTICES OF MOTION, AFFIDAVITS, AND ORDERS IN GENERAL.

§ 4401. **Motions and notices in general.** It is prescribed by the statute of California that "every direction of a court or judge made or entered in writing, and not included in a judgment, is denominated an order. An application for an order is a motion."<sup>1</sup> It may be defined to be the judgment or conclusion of the court, upon any motion or proceeding; and includes cases where affirmative relief is granted, and cases where relief is denied.<sup>2</sup> The effect of an order, general in its terms at its close, may be determined or ascertained by reference to the motion upon which it was made, when such motion is recited in the order at its commencement.<sup>3</sup> In practice, a motion is an oral argument to the court, showing why a certain order should be made; while a notice is a written information given to the opposite party, that at a certain time and place the party giving the same will move the court for a certain order, stating what. It is also necessary for the moving party to state in such notice the grounds or particular points upon which the motion will be

<sup>1</sup> Cal. Code Civ. Pro., § 1003; *Peters v. Vawter*, 10 Mont. 201.

<sup>2</sup> *Gilman v. Contra Costa Co.*, 8 Cal. 57; 68 Am. Dec. 290; *In re Smith*, 98 Cal. 640. An order is a direction of a court or judge made or entered in writing, and not included in a judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court, or necessary to be determined in carrying into execution the final judgment. *McGuire v. Drew*, 83 Cal. 225. A party in court must take notice of all orders in the case, and of pleadings filed in pursuance thereof. *Williams v. Miller*, 1 Wash. Ter. 88.

<sup>3</sup> *McKinley v. Tuttle*, 34 Cal. 248.

made;<sup>4</sup> and also upon what the motion will be founded, as upon affidavits, papers on file, etc. It is also provided by our statute that motions must be made in the county in which the action is brought, or in an adjoining county within the same district.<sup>5</sup> Thus the practitioner may readily know where the motion must be made. The title of the action must also be correctly given, with the date and hour of the day when it will be made, and the particular place — *e. g.*, the city hall, courthouse, etc. The true practice is to be very specific in all questions of time, place, and object of the motion. There are certain motions which are termed contested motions, and certain others termed *ex parte* motions. The former always require previous notice, the latter never. An order made without notice may be vacated or modified without notice.<sup>6</sup> When notice is required it must be given in writing five days before the hearing, if the court is held in the same district with both parties; otherwise ten days, except when served by mail.<sup>7</sup> This is the statutory rule, but the court, in the exercise of sound discretion, may extend or even shorten the time. These are questions which arise in the course of the action, and only relate to the practice, and, so far as allowable by the statute, are generally regulated by the rules of each particular court, a full knowledge of which is too frequently not regarded by the profession as essential. The question of service of notices, where important rights are to be affected, must be carefully considered. The statute must be strictly followed to insure due and legal service, as nothing will be left to implication. Unless the statute be strictly followed, the court will not have acquired jurisdiction to make the order asked for, and the entire proceedings will be illegal. Frequently notice is waived by stipulation of attorneys not in writing. This may be sufficient among honorable practitioners, but it is not the true practice, as it sometimes fails of its object, whereas, if the directions of the statute be strictly followed, no misunderstanding can arise.

<sup>4</sup> *Freeborn v. Glazer*, 10 Cal. 337; *Quimby v. Boyd*, 8 Col. 194. Written notice of motions is required in all cases except those made during the progress of a trial. Col. Civil Code, § 372; *Taylor v. Derry*, 4 Col. App. 109; *Mallan v. Higenbotham*, 10 Col. 264.

<sup>5</sup> Cal. Code Civ. Pro., § 1004.

<sup>6</sup> *Id.*, § 937; *Coburn v. Pac. L. & M. Co.*, 46 Cal. 31.

<sup>7</sup> *Id.*, § 1005. Notice of motion is not necessary except when the statute requires it, or when directed by a court or judge in pursuance thereof. *Rush v. Colsey*, 16 Oreg. 267. When necessary the notice must be served ten days before the time appointed for the

§ 4402. **Form of notice.**

*Form No. 1075.*

[TITLE.]

To ....., attorney for .....

Please take notice that I will move this honorable court, at the courtroom, in the city hall, on the ..... day of ....., 18.., at ..... o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order [state the substance of order], and for such other and further order as may be just. Said motion will be made upon the ground that [state particularly the grounds upon which the motion is founded], and will be supported by the affidavit, a copy of which is herewith served upon you, and the pleadings, papers, and records in the above cause.

[DATE.]

[SIGNATURE.]

Attorney for .....

§ 4403. **Appearance.** Service of notice of appearance must antedate or be contemporaneous with the service of all other notices and papers.<sup>8</sup>

§ 4404. **Computation of time.** The time within which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded.<sup>9</sup> When the act to be done relates to the pleadings in the action, or the undertakings to be filed, or the justification of sureties, or the preparation of statements, or of bills of exceptions, or of amendments thereto, or the service of notices other than of appeal, the time allowed by this Code may be extended, upon good cause shown, by the judge of the Superior Court in and for the county in which the action is pending, or by the judge who presided at the trial of said action; but such extension shall not exceed thirty days without the consent of the adverse party; except that when it appears to the judge to whom said application is made, that the attorney of record for the party applying for said extension is actually engaged in attendance upon a session of the state Legislature,

hearing, unless the court or judge prescribe a shorter time by order indorsed on the notice. *Id.* Motion may be made orally, though it is better practice to have it made in writing or entered in the minutes of the court. *Herrlich v. McDonald*, 80 Cal. 472.

<sup>8</sup> *Steinbach v. Leese*, 27 Cal. 297.

<sup>9</sup> Cal. Code Civ. Pro., § 12; see *Derby v. City of Modesto*, 104 Cal. 522; *Hoyt v. Railroad Co.*, 87 *id.* 610.

as a member thereof; in which case it will be the duty of said judge to extend said time until the Legislature adjourns, and thirty days thereafter.<sup>10</sup>

**§ 4405. Consolidation of actions.** Whenever two or more actions are pending at one time between the same parties and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated.<sup>11</sup> The Supreme Court will not consolidate suits brought upon distinct causes of action.<sup>12</sup>

**§ 4406. Construction.** If there is any ambiguity in the terms of a notice rendering its meaning doubtful, the construction must be most strongly against the party giving the notice.<sup>13</sup>

**§ 4407. Discretion.** All the proceedings in a case are supposed to be within the control of the court while they are in paper, and before a jury is sworn or judgment given. Therefore, orders may be revised, and such as in the judgment of the court may have been irregular or improperly made may be set aside.<sup>14</sup> A question whether a party had a right to proceed summarily on motion to vacate a decree in the Circuit Court is merely one of practice, to be governed by the rules prescribed by the Supreme Court, and the established principle and usage of a court of chancery.<sup>15</sup>

**§ 4408. Due notice.** Due notice can not be defined. Circumstances must control each case.<sup>16</sup> Notice to a deputy marshal is equivalent to notice to the marshal himself.<sup>17</sup>

**§ 4409. Notice essential.** Special motions, unlike those granted of course, require allowance by the judge, and previous notice to the adverse party.<sup>18</sup> Upon application by counsel for

<sup>10</sup> Cal. Code Civ. Pro., § 1054, as amended by act of January 31, 1895; see *Reay v. Butler*, 99 Cal. 477, 480. Extension of time for filing notices under this section. See *Burton v. Todd*, 68 Cal. 485.

<sup>11</sup> *Id.*, § 1048; N. Y. Code, § 817; *Putnam v. Lyon*, 3 Col. App. 144.

<sup>12</sup> *Wallace v. Eldredge* (No. 2), 27 Cal. 498.

<sup>13</sup> *Carpentier v. Thurston*, 30 Cal. 123.

<sup>14</sup> *Breedlove v. Nicolet*, 7 Pet. 413. An order obtained "by means of an artifice and trick practiced upon the court" may be set aside by the court which made it. *Page v. Page*, 77 Cal. 83.

<sup>15</sup> *Wiggins v. Gray*, 24 How. (U. S.) 303.

<sup>16</sup> *Lawrence v. Bowman*, 1 McAll. 419.

<sup>17</sup> *United States v. Bank of Arkansas*, Hempst. 460.

<sup>18</sup> *United States v. Parrott*, 1 McAll. 447; *Troth v. Crow*, 1 Col. App. 453.

the plaintiff, a day was assigned to argue the question of the jurisdiction of the court to proceed in the cause, upon the condition that notice should be given to the defendant, to enable him to employ counsel in the interim, as the court would not feel bound by its decision in an *ex parte* argument if the defendant should desire to have the question again argued.<sup>19</sup> Previous notice of a motion for the appointment of a receiver is unnecessary when the parties to be affected are in court by counsel.<sup>20</sup> A motion to produce a paper in the possession of the plaintiff, which is necessary to enable the plaintiff to plead, may be granted, in the discretion of the court, although no notice has been given; otherwise when possession of a paper is desired to be used in evidence.<sup>21</sup> The above references are more especially applicable to the practice in the United States courts.<sup>22</sup> It is prescribed by the Code of Civil Procedure of California that after appearance a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. But where a defendant has not appeared, service of notice or papers need not be made upon him, unless he be imprisoned for want of bail.<sup>23</sup> Notices must be in writing.<sup>24</sup>

**§ 4410. Notice to attorney.** It is the duty of an attorney to communicate to his client whatever information he acquires in relation to the subject-matter of the suit, and he will be presumed to have performed his duty, and notice to him is constructive notice to his client.<sup>25</sup> Where a party changes his attorney in an action, and there is no regular substitution of attorneys as pointed out by statute, notices may be served on the attorney of record.<sup>26</sup> Notice of motion for new trial must be given by the attorney of record.<sup>27</sup>

<sup>19</sup> *New Jersey v. New York*, 3 Pet. 461.

<sup>20</sup> *McLean v. Lafayette Bank*, 3 McLean, 503.

<sup>21</sup> *Bronson v. Kensey*, 3 McLean, 180.

<sup>22</sup> See Cal. Code Civ. Pro., §§ 449 and 1938.

<sup>23</sup> Cal. Code Civ. Pro., § 1014. A party can not render himself unable to receive a notice, and then be heard to complain because notice is not given. *Orr Water Co. v. Reno Water Co.*, 19 Nev. 60.

<sup>24</sup> *Id.*, § 1010. Where notice of a decision is required to be given, written notice is usually intended. *Forni v. Yoell*, 99 Cal. 172, 176.

<sup>25</sup> *Blerce v. Red Bluff Hotel Co.*, 31 Cal. 160; see *Weeks on Attorneys*, § 237.

<sup>26</sup> *Grant v. White*, 6 Cal. 55.

<sup>27</sup> *Prescott v. Salthouse*, Cal. Sup. Ct., July Term, 1878; and must be served upon the attorney of record. *Frost v. Meetz*, Cal. Sup. Ct., July Term, 1877; see, also, Cal. Code Civ. Pro., § 1015.



§ 4411. **Order of court — entry nunc pro tunc.** A court has no power, after the adjournment of a term, to direct the clerk to enter in the minutes, *nunc pro tunc*, an order alleged to have been made at the adjourned term, when there is nothing in the record to show that such order was made.<sup>28</sup>

§ 4412. **Order to show cause.** An order to show cause why a judgment should not be vacated must be served, or it will be error to vacate the judgment on such order.<sup>29</sup> An order to show cause why a commission should not issue to take a deposition is, if served upon the adverse party, a sufficient notice to him to justify the issuance.<sup>30</sup>

§ 4413. **Order, when granted.** Motion for any rule or order is not allowed when the court is equally divided. If an affirmative decision be indispensable, the case stops and the parties go out of court; otherwise the case stands as if no motion had been made.<sup>31</sup> A motion made at one term not being decided nor continued, the court will order a continuance *nunc pro tunc*, and the defendant will not be required to take up the motion at that term, as he had the right to suppose that it was abandoned.<sup>32</sup>

§ 4414. **Order in insolvent proceedings.** An order of the county judge in insolvent proceedings, made under sections 5 and 8 of the California Insolvent Act, which directs the clerk to issue an "order for the creditors to appear \* \* \* and show cause why the insolvent should not be discharged from his debts, in pursuance of the insolvent laws, and likewise make an assignment of his estate for the benefit of his creditors," is a substantial compliance with said act.<sup>33</sup>

§ 4415. **Restitution of rights after reversal of judgment.** Where the judgment of a lower court is reversed or modified on appeal, although the Supreme Court may restore the prop-

<sup>28</sup> Hegeler v. Henckell, 27 Cal. 491. An order *nunc pro tunc* may be made to correct a mistake in failing to enter an order which was actually made, or which should have been made as a matter of course. Estate of Skerrett, 80 Cal. 62; see, also, Crim v. Kessing, 89 id. 478.

<sup>29</sup> Vallejo v. Green, 16 Cal. 160.

<sup>30</sup> Dambmann v. White, 48 Cal. 439.

<sup>31</sup> Goddard v. Coffin, Davels, 381.

<sup>32</sup> Hurd v. Williams, 4 McLean, 239.

<sup>33</sup> Flint v. Wilson, 36 Cal. 24; see Insolvent Act of March 26, 1895.

erty or rights lost by the erroneous judgment or order, this does not exclude the lower court from exercising the same power. The party aggrieved may proceed in the lower court by motion, against which there seems to be no Statute of Limitations where there is no unreasonable delay.<sup>34</sup>

§ 4416. **Rule to show cause.** It has been held by the Supreme Court of the United States that the rule on the judge of a District Court to show cause is a rule upon the judge to explain his conduct; and furnishes a case by implication which makes it proper that the Supreme Court should know the reason for his decision. The rule ought not to be granted when the record does not show mistake, misconduct, or omission of duty on the part of the court, unless a *prima facie* case be made out by affidavit.<sup>35</sup> Malicious conduct of an officer in executing process can not be reached by motion.<sup>36</sup> But when a sheriff, having received an execution on which costs are due, fails to make them when practicable, he becomes responsible, and may be reached by motion. An order of the client or attorney can not change this liability.<sup>37</sup>

§ 4417. **Service, how made.** Service may be personal, by delivery to the party or attorney on whom the service is required to be made, or it may be as follows: 1. If upon an attorney, it may be made during his absence from his office, by leaving the notice or other papers with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving them, between the hours of eight in the morning and six in the afternoon, in a conspicuous place in the office; or if it be not open so as to admit of such service, then by leaving them at the attorney's residence, with some person of suitable age and discretion; and if his residence be not known, then by putting the same, inclosed in an envelope, into the post-office, directed to such attorney; 2. If upon a party, it may be made by leaving the notice or other paper at his residence, between the hours of eight in the morning and six in the evening, with some person of suitable age and discretion;

<sup>34</sup> Reynolds v. Harris, 14 Cal. 667; 76 Am. Dec. 459; see, also, Pico v. Cuyas, 48 Cal. 639.

<sup>35</sup> Postmaster-General v. Tugg, 11 Pet. 173.

<sup>36</sup> Smith v. Miles, Hempst. 34.

<sup>37</sup> Lewis v. Hamilton, Hempst. 21.

and if his residence be not known, by putting the same, inclosed in an envelope, into the post-office, directed to such party.<sup>38</sup> An affidavit which states that affiant "left a true copy at the office of C. & B., the attorneys for the defendant," is insufficient.<sup>39</sup> In all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt.<sup>40</sup> Reading an order of court to the party to be served is not a compliance with a statute which requires that such party shall have reasonable notice in writing of the order.<sup>41</sup> A notice can not lawfully be served on Sunday.<sup>42</sup>

**§ 4418. Service by mail.** Service by mail may be made where the person making the service and the person on whom it is to be made reside or have their offices in different places, between which there is a regular communication by mail.<sup>43</sup> In such case, the notice or other paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid. The service is complete at the time of deposit, but if within a given number of days after such service a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done is extended one day for every twenty-five miles distance between the place of deposit and the place of address, such extension not to exceed ninety days in all.<sup>44</sup> Distance is a question of fact to be

<sup>38</sup> Cal. Code Civ. Pro., § 1011. The "delivery," which constitutes a personal service under this section, need not be made by the party attempting to make the service, but can be effected through a clerk or messenger, or through any agency by which a delivery can be made. *Heinlen v. Heilbron*, 94 Cal. 636. In the absence of an attorney from his office, the service of a notice on him is sufficiently made by depositing a copy thereof through the door of his office into a postal box which had been placed there for reception of documents. *January v. Superior Court*, 73 Cal. 637.

<sup>39</sup> *Gallardo v. A. & P. T. Co.*, 49 Cal. 510.

<sup>40</sup> Cal. Code Civ. Pro., § 1015.

<sup>41</sup> *Hart v. Gray*, 3 Sumn. 339.

<sup>42</sup> *Chesapeake & Ohio Canal Co. v. Bradley*, 4 Cranch C. C. 193; see § 1977, *ante*.

<sup>43</sup> Cal. Code Civ. Pro., § 1012.

<sup>44</sup> *Id.*, § 1013; see, also, *Id.*, § 1005.

determined by proof.<sup>45</sup> A party relying upon a service of notice by mail must show strict compliance with the statute.<sup>46</sup>

**§ 4419. Service on nonresidents.** When a plaintiff or defendant who has appeared, resides out of the state, and has no attorney in the action or proceeding, the service may be made on the clerk for him.<sup>47</sup> But the absence of a purchaser at sheriff's sale, from the state, does not excuse service on him of notice of a motion to set aside the execution and sale.<sup>48</sup>

**§ 4419a. Motions — knowledge of judge.** In all motions before a judge during the progress of a trial, he may act on his own knowledge in regard to things which, in their nature, are better known to himself than they could be to others.<sup>49</sup>

**§ 4419b. The same — renewal of.** In all ordinary motions, where the jurisdiction is not limited by statute, it is in the discretionary power of the court or judge hearing and denying a motion to grant leave for its renewal.<sup>50</sup> In a case where a motion is made to vacate a judgment entered without findings, the court has jurisdiction, and it is within its discretion to allow a motion to vacate the judgment to be renewed, although it had previously been denied.<sup>51</sup>

**§ 4419c. The same — dilatory, not favored.** Dilatory motions based upon special appearances are not favored, being contrary to the policy of the reformed procedure.<sup>52</sup>

<sup>45</sup> Neely v. Naglee, 23 Cal. 152.

<sup>46</sup> People v. Alameda Turnpike Co., 30 Cal. 182; Heinlen v. Hellbron, 94 id. 636. Sufficiency of service of notice by mail. See Eltzroth v. Ryan, 91 id. 584; Murdock v. Clarke, 73 id. 25; Mining Co. v. New Basil Co., 63 id. 121. Service by mail can not be made by a deposit in the post-office in the place where the attorney on whom the service is to be made resides. Thompson v. Brannan, 76 Cal. 618. Sufficient publication of notice in newspaper. See Lent v. Tillson, 72 Cal. 404; Richardson v. Tobin, 45 id.

<sup>47</sup> Cal. Code Civ. Pro., § 1015.

<sup>48</sup> Eckstein v. Calderwood, 34 Cal. 658.

<sup>49</sup> Road Co. v. National Bank, 100 Cal. 316.

<sup>50</sup> Hitchcock v. McElrath, 69 Cal. 639; Jensen v. Barbour, 12 Mont. 536; Kenny v. Kelleher, 63 Cal. 442. The judge may at chambers grant leave to renew the motion. Id.

<sup>51</sup> Mace v. O'Reilly, 70 Cal. 231.

<sup>52</sup> Burkhardt v. Haycox, 19 Col. 389.

**§ 4419d. The same — abandonment of.** The failure of the defendant to appear upon the hearing of his motion for leave to file a supplemental answer will be considered an abandonment of the motion.<sup>53</sup>

**§ 4419e. The same — in transcript, when considered.** Motions copied into the transcript and entries by the clerk of rulings thereon are not parts of the record, and will not be considered on appeal unless properly brought before the court.<sup>54</sup>

**§ 4419f. Waiver of written notice.** Written notice of the overruling of a demurrer is waived by the presence in court of the attorney for the demurring party at the time of the ruling, and the time to amend or answer runs in such case from the time when the ruling is made.<sup>55</sup>

**§ 4419g. Orders — order made during vacation.** An order during vacation dismissing attachment proceedings, and ordering the attached property released, upon a motion therefor filed and argued during term, is void, and the motion is thereafter still pending.<sup>56</sup>

**§ 4419h. The same — presumption in favor of.** If an order of the trial court is warranted by any possible state of facts not negatived by the record upon appeal, it must be presumed in justification of the order that such a state of facts existed.<sup>57</sup>

**§ 4419i. The same — entry of, in minutes.** The action of the court does not depend upon the entry of its orders by the clerk, but upon the fact that the orders have been made, and whenever it is shown that an order has been made by the court, it is as effective as if it had been entered of record by the clerk.<sup>58</sup> An order entered upon consent can not be assigned as error.<sup>59</sup>

**§ 4420. Title of action.** An affidavit, notice, or other paper, without the title of the action or proceeding in which it is

<sup>53</sup> Wood v. Brush, 72 Cal. 224.

<sup>54</sup> Fisher v. United States, 1 Okl. 252.

<sup>55</sup> Wall v. Heald, 95 Cal. 364.

<sup>56</sup> Colter v. Marriage, 3 N. Mex. 351.

<sup>57</sup> Cockrill v. Clyma, 98 Cal. 123.

<sup>58</sup> Niles v. Edwards, 95 Cal. 47; Von Schmidt v. Wildber, 99 id. 511.

<sup>59</sup> Putnam v. Lyon, 3 Col. App. 144.

made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding.<sup>60</sup>

**§ 4421. Transfer of motions and orders.** When a notice of motion is given, or an order to show cause is made returnable before a judge out of court, and at the time fixed for the motion, or on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge, before whom it might originally have been brought.<sup>61</sup>

**§ 4422. Affidavit denying genuineness and due execution of written instrument in a pleading.**

*Form No. 1076.*

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above-entitled cause.

II. The note [or bill, or other written instrument], set forth in the answer of the defendant herein, is not my note [or was not made or indorsed or accepted by me, or otherwise denying the making or executing of the instrument].

[JURAT.]

[SIGNATURE.]

**§ 4423. Denial of execution.** When a copy of a written instrument is contained in an answer or annexed thereto, to avoid an admission of its genuineness and due execution, the plaintiff must file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant.<sup>62</sup> But the execution of such instrument is not deemed admitted by failure to deny the same on oath if the party desiring to controvert the same is, upon demand, refused an inspection of the original.<sup>63</sup>

<sup>60</sup> Cal. Code Civ. Pro., § 1046; *Mills v. Dunlap*, 3 Cal. 94; *Butler v. Ashworth*, 100 Id. 334.

<sup>61</sup> Cal. Code Civ. Pro., § 1006.

<sup>62</sup> Id., § 448; see *In re Garcelon*, 104 Cal. 581.

<sup>63</sup> Cal. Code Civ. Pro., § 449. As to order for an inspection, see Id., § 1000.

**§ 4424. Notice of motion for order allowing party to enter on land and make survey, etc., in actions concerning real property.**

*Form No. 1077.*

[TITLE.]

To G. H., attorney for defendant:

Please take notice that A. B., the plaintiff herein, will, on the ..... day of ...., 18.., at the hour of ..... o'clock, A. M., or as soon thereafter as counsel can be heard, at the courtroom of said court in the city hall, in the city of ....., move said court to grant the plaintiff herein an order allowing him the right to enter upon the property in controversy in this action, hereinafter described, and to make survey and measurement thereof for the purpose of [state particularly the object for which the survey is desired]. Said motion will be made upon the affidavit herewith served upon you, and upon the pleadings, records, and papers in the cause. The property to be affected by such order is described as follows [description].

[DATE.]

[SIGNATURE.]

**§ 4425. Actions for real property.** The court in which an action is pending for the recovery of real property may, or a judge thereof, or a county judge, may, on motion upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter upon the property and make survey and measurement thereof, and of any tunnels, shafts, or drifts thereon, for the purpose of the action.<sup>64</sup>

**§ 4426. Service of order.** The order must describe the property, and a copy thereof must be served on the owner or occupant; and thereupon such party may enter upon the property with necessary surveyors and assistants, and make such survey and measurement; but if any unnecessary injury be done to the property, he is liable therefor.<sup>65</sup>

**§ 4427. Order allowing party to enter for survey.**

*Form No. 1078.*

[TITLE.]

The motion for an order allowing the plaintiff to enter upon the lands in controversy in this action, and hereinafter described, coming on to be heard this day, on the affidavits introduced by

<sup>64</sup> Cal. Code Civ. Pro., § 742.

<sup>65</sup> Id., § 743.

the respective parties, and the pleadings, records, and papers in the cause, E. F. appearing as attorney for the plaintiff, and G. H. appearing for the defendant and opposing said motion, and it appearing to the court that good cause exists therefor, it is hereby ordered that plaintiff herein be and he is hereby allowed to enter into and upon the land hereinafter described, with the necessary surveyors and their assistants, and to make survey and measurement thereof, for the purpose of [state purpose]. The land upon which plaintiff is so allowed to enter is described as follows [description].

[DATE.]

[SIGNATURE OF JUDGE.]

**§ 4428. Notice requiring security for costs.**

*Form No. 1079.*

[TITLE.]

To . . . . ., attorney for plaintiff:

Please take notice that the defendant C. D. requires security on the part of the plaintiff A. B., for the costs and charges which may be awarded against said plaintiff in this action, in accordance with the statute in such case made and provided, on the ground that said plaintiff is a nonresident of this state [or a foreign corporation].

[DATE.]

[SIGNATURE.]

**§ 4429. Dismissal of action.** After the lapse of thirty days from the service of notice that security is required, or of an order for new or additional security, upon proof thereof, and that no undertaking has been filed, the court or judge may order the action to be dismissed.<sup>66</sup> Where notice requiring security for costs was given, unaccompanied by an order staying proceedings, and judgment was rendered for defendant, and plaintiff appealed, it was held that the motion to dismiss the action came too late after judgment, and that the motion to dismiss the appeal must be denied, the undertaking on appeal being sufficient.<sup>67</sup> The foregoing decision seems to take it for granted that an order for a stay of proceedings would be proper, but whether it is necessary — *quaere*.<sup>68</sup>

**§ 4430. From whom required.** Security for costs and charges which may be awarded against the plaintiff, not exceeding three

<sup>66</sup> Cal. Code Civ. Pro., § 1037.

<sup>67</sup> Comstock v. Clemens, 19 Cal. 77.

<sup>68</sup> See Cal. Code Civ. Pro., § 1036.



hundred dollars, may be required by the defendant when the plaintiff resides out of the state or is a foreign corporation.<sup>69</sup> In New York, a plaintiff who is a nonresident at the time of commencing his action is not excused from filing security for costs by the fact that he afterwards became a resident.<sup>70</sup> The defendant has the right to security for costs only, where all the plaintiffs are nonresidents.<sup>71</sup> A foreign government suing in a court of the state may be required to file security for costs.<sup>72</sup> The principal office or place of business of a corporation may be said to be its residence.<sup>73</sup> In California, a new or additional undertaking may be ordered, upon proof that the original undertaking is insufficient.<sup>74</sup> It was formerly held otherwise in New York.<sup>75</sup>

<sup>69</sup> Cal. Code Civ. Pro., § 1036.

<sup>70</sup> *Ambler v. Ambler*, 8 Abb. Pr. 340.

<sup>71</sup> *Ten Broeck v. Reynolds*, 13 How. Pr. 462. See, as to security for costs, *Swift v. Stine*, 3 Wash. Ter. 518; *Robinson v. Haller*, 8 Wash., St. 309; *Marsh v. Kinna*, 2 Mont. 547.

<sup>72</sup> *Republic of Mexico v. Arrangols*, 3 Abb. Pr. 470.

<sup>73</sup> *Jenkins v. California Stage Co.*, 22 Cal. 537; see § 55, *ante*.

<sup>74</sup> Cal. Code Civ. Pro., § 1036.

<sup>75</sup> *Hartford Quarry Co. v. Pendleton*, 4 Abb. Pr. 460.

## CHAPTER II.

### ITEMS OF ACCOUNT.

#### § 4431. Demand for bill of items.

*Form No. 1080.*

[TITLE.]

To E. F., attorney for plaintiff:

Please take notice that the defendant hereby demands a bill of the particular items of the account mentioned in the complaint of plaintiff herein.

[DATE.]

[SIGNATURE.]

#### § 4432. Copy of account.

*Form No. 1081.*

[TITLE.]

[Here set forth the account referred to in the pleading.]

To ....., attorney:

Please take notice that the above is a copy of the account demanded by you [or referred to in the complaint or answer] in this action.

[DATE.]

[SIGNATURE.]

§ 4433. Demand for items. Within five days after a demand thereof in writing a copy of the account shall be delivered to the adverse party, or evidence thereof can not be given, and if too general or defective a further account may be ordered.<sup>1</sup> A complaint for money due for the use and occupation of land does not present a claim upon which a bill of particulars can be required.<sup>2</sup>

§ 4434. Items set forth. The items of the account furnished must be set forth with as much particularity as the nature of the case admits of.<sup>3</sup> A bill of particulars is sufficiently

<sup>1</sup> Cal. Code Civ. Pro., § 454; see, also, *Scott v. Frost*, 4 Cal. App. 557.

<sup>2</sup> *Moore v. Bates*, 46 Cal. 29.

<sup>3</sup> *Bagley's Pr.* 204; *Connor v. Hutchinson*, 17 Cal. 280; *Kellogg v. Paine*, 8 How. Pr. 329.

specific if it apprises the opposite party of the evidence to be offered.<sup>4</sup> If the bill is too general, the party receiving it should obtain an order for further particulars. If he does not, he can not proceed as if no bill was rendered.<sup>5</sup> Where a party has obtained a further bill of particulars under an order of the court, if he intends to object to any evidence upon the subject, he should have obtained, previous to the trial, an order excluding such evidence.<sup>6</sup>

**§ 4435. What need not be set forth.** A party is not bound to furnish particulars of set-offs with which he volunteers to credit the opposite party;<sup>7</sup> nor when a knowledge of the facts on which a party's claim rests is more with the defendant than the plaintiff.<sup>8</sup> Where the complaint *in haec verba* set forth the bill of sale, it was held to remedy a defect in the allegation of the quantity of goods sold. A party must be presumed to know what was intended by his own account.<sup>9</sup>

**§ 4436. Order for a further bill of particulars.**

*Form No. 1082.*

[TITLE.]

On good cause shown, let the plaintiff's attorney deliver to the defendant's attorney a further account in writing of the particulars of the plaintiff's demand for which this action is brought, within ..... days, specifying the dates of the said several items [or other matters in which the bill is deficient].

[DATE.]

[SIGNATURE.]

**§ 4437. Order.** An order of the court for a further account should specify the particulars in reference to which a further specification is required.<sup>10</sup>

<sup>4</sup> Smith v. Hicks, 5 Wend. 48.

<sup>5</sup> Prov. Tool Co. v. Prader, 32 Cal. 634; 91 Am. Dec. 598.

<sup>6</sup> Connor v. Hutchinson, 18 Cal. 279.

<sup>7</sup> Williams v. Shaw, 4 Abb. Pr. 209; Gilles v. Betz, 15 id. 285.

<sup>8</sup> Young v. De Mott, 1 Barb. 30.

<sup>9</sup> Cochran v. Goodman, 3 Cal. 244.

<sup>10</sup> Connor v. Hutchinson, 17 Cal. 280; Kellogg v. Paine, 8 How. Pr. 329. Sufficiency of bill of particulars. See Isham v. Parker, 3 Wash. St. 755. It is a matter resting largely in the discretion of the trial court whether a bill of particulars should or should not be ordered in a particular case. Ferry v. King County, 2 Wash. St. 337; Rayburn v. Hurd, 20 Oreg. 229. A bill of particulars is

§ 4438. **Order for an inspection, etc., of books.** Any court in which an action is pending, or a judge thereof, or a county judge, may, upon notice, order either party to give to the other within a specified time an inspection and copy, or permission to take a copy of entries of accounts in any book, or of any document or paper in his possession or his control containing evidence relating to the merits of the action, or the defense therein.<sup>11</sup> If compliance with the order be refused, the entries, documents, or paper may be excluded as evidence; or if wanted as evidence by the party applying, the court may direct the jury to presume them to be such as he alleges them to be; and punish the party refusing for contempt.<sup>12</sup>

not a part of the record proper, and the appellate court can not take notice that a paper certified in the transcript as a bill of particulars was the bill in controversy at the trial, nor that some other or further bill was not furnished in due time. *Fryer v. Breeze*, 16 Col. 323.

<sup>11</sup> Cal. Code Civ. Pro., § 1000.

<sup>12</sup> Id. See chapter on this subject, *post*.

## CHAPTER III.

### ENLARGING TIME TO PLEAD.

§ 4439. **In general.** The court may, in furtherance of justice, and on such terms as may be proper, enlarge the time for answer or demurrer;<sup>1</sup> or may allow an answer to be made after the time limited by this Code.<sup>2</sup> The party must take the initiatory steps to obtain relief before the expiration of the term at which final judgment is rendered in all cases except those mentioned in the statute.<sup>3</sup> Where a demurrer to a complaint is overruled, and an application is subsequently made for leave to file an answer, the allowance of the application rests in the discretion of the court, subject to review in case of its arbitrary or unreasonable exercise. The exercise of this power by the court must in a degree depend upon the special circumstances of each case, and be so governed as to prevent delays and to promote justice.<sup>4</sup> In such case, where no application was made to the court for leave to answer, and no meritorious defense was asserted, this court will not reverse the judgment and open the case for another trial.<sup>5</sup>

#### § 4440. **Affidavit on motion to enlarge time to plead.**

*Form No. 1083.*

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled action.

II. I have fully and fairly stated the case in this cause to G. H., my counsel therein, who resides at ..... [or at No. ... , ..... street, in the city of .....]; and I have a good and substantial defense, on the merits, to said

<sup>1</sup> Cal. Code Civ. Pro., § 473.

<sup>2</sup> Id.; see, also, Id., § 1054.

<sup>3</sup> Casement v. Ringgold, 28 Cal. 338.

<sup>4</sup> Thornton v. Borland, 12 Cal. 438.

<sup>5</sup> Id.

action, as I am advised by my counsel, after such statement so made to him as aforesaid, and verily believe.

III. [State excuse for desiring enlargement of time.]

IV. That the complaint was served on the ..... day of ..... 18.., and the time to answer will expire on the ..... day of ....., 18.., that no extension of such time has been had, and ..... days further time are necessary to prepare and file said answer.

[JURAT.]

[SIGNATURE.]

**§ 4441. Order enlarging time to plead.**

*Form No. 1084.*

On the annexed affidavit of C. D., and on motion of G. H., his attorney, it is ordered that said defendant have ..... days further time from and after the ..... day of ....., 18.., to answer the complaint of plaintiff herein.

[DATE.]

[SIGNATURE OF JUDGE.]

## CHAPTER IV.

### AMENDMENTS.

**§ 4442. In general.** In California, as in most states having Codes of Civil Procedure, it is provided that courts must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties.<sup>1</sup> If the error is such that it may not be disregarded, the question whether it may be cured by amendment is always important and sometimes difficult. Under the restrictions or limitations named in the statute, the courts have power to amend its process, the pleadings in the cause, and the proceedings therein, including orders and the judgment or decree. The granting of amendments is largely in the discretion of the court, and must depend upon the circumstances of the particular case, and the consideration whether it is in furtherance of justice.<sup>2</sup>

**§ 4443. Amendment of process.** The Code of Civil Procedure of California provides that "every court has power to amend and control its process and orders so as to make them conformable to law and justice."<sup>3</sup> In New York the court may upon the trial or at any other stage of the action, before or after judgment, in furtherance of justice, amend any process, pleading, or other proceeding, in certain specified particulars.<sup>4</sup> Similar provisions are found in all the Codes. But a summons is not amendable of course. It can only be amended by permis-

<sup>1</sup> Cal. Code Civ. Pro., § 475; N. Y. Code, § 723.

<sup>2</sup> Exercise of discretion by trial court in granting amendments. See *Horn v. Reitter*, 15 Col. 317; *Davis v. Johnson*, 4 Col. App. 545; and see § 4447, *post*. Amendments are never allowable for the purpose of defeating justice. *Heegaard v. Trust Co.*, 3 S. Dak. 569. And leave to amend a pleading is of no effect unless the order is complied with. *Kimball v. Gearhart*, 12 Cal. 46; *Briggs v. Bruce*, 9 Col. 282.

<sup>3</sup> Section 128, subd. 8.

<sup>4</sup> See Code (1877), § 723.

sion of the court.<sup>5</sup> The particulars in which the court may authorize an amendment of process are numerous. A summons may be amended by inserting a notice of the cause of action.<sup>6</sup> Leave was granted to amend a summons by increasing the amount, although as to the increased amount the effect was to deprive the defendant of the benefit of the Statute of Limitations.<sup>7</sup> And where by setting aside a summons and complaint as irregular the plaintiff would have been barred by the Statute of Limitations, the court, instead of setting the proceedings aside, permitted an amendment on payment of costs.<sup>8</sup> An amendment of summons by referring to the complaint as annexed when it was omitted may be allowed.<sup>9</sup> All mistakes may be corrected by amendment under section 723 of the New York Code. Section 473 of the California Code of Civil Procedure is also very broad, though not so comprehensive as section 128, above quoted.

**§ 4444. Amendment of pleadings.** Any pleading may be amended once by the party, of course, and without costs, at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon by filing the same as amended and serving a copy on the adverse party, who may have ten days thereafter to answer or demur to the amended pleading.<sup>10</sup> Except as provided in these sections, leave to amend must be obtained. An amendment must be substantial, not merely colorable.<sup>11</sup> Adding a verification to a complaint is not an amendment.<sup>12</sup> And it will not be allowed where the orig-

<sup>5</sup> *McCrane v. Moulton*, 3 Sandf. 736; *Walkenshaw v. Perzell*, 32 How. Pr. 310; S. C., 5 Rob. 648.

<sup>6</sup> *Poiack v. Hunt*, 2 Cal. 193.

<sup>7</sup> *Deane v. O'Brien*, 13 Abb. Pr. 11; see, also, *Sluyter v. Smith*, 2 Bosw. 673.

<sup>8</sup> *Weir v. Slocum*, 3 How. Pr. 397.

<sup>9</sup> *Foster v. Wood*, 1 Abb. Pr. (N. S.) 150; S. C., 30 How. Pr. 284; see § 3902, *ante*. Amendment of return of summons. *Allison v. Thomas*, 72 Cal. 562.

<sup>10</sup> Cal. Code Civ. Pro., § 472; N. Y. Code, § 542; and see *Hedges v. Darn*, 72 Cal. 520.

<sup>11</sup> *Snyder v. White*, 6 How. Pr. 321.

<sup>12</sup> *George v. McAvoy*, 6 id. 200. It has been held to be no abuse of discretion for the trial court to allow an amended complaint to be amended by adding a verification, though neither the original nor the amended complaint was verified. *Ruffatti v. Lexington Min. Co.*, 10 Utah, 388; and see *Buell v. Beckwith*, 59 Cal. 480; *Case v. Edson*, 40 Kan. 161.



inal pleading was not verified. Amendments can only be allowed where there is a defect in the parties, in its prayers for relief, or in the omission or mistake of some fact or circumstance connected with the substance of the case.<sup>13</sup> Courts should allow amendments with great liberality at any time before trial, if the amendment is essential to a fair trial on the legal merits of the case and does not occasion injurious delays.<sup>14</sup> Amendments are to be allowed or denied in furtherance of substantial justice, that is, such justice as the law administers when correctly applied.<sup>15</sup> Motions to amend are not to be granted as matter of course, but only when good cause is shown therefor.<sup>16</sup>

§ 4445. **When allowable.** Amendments will be allowed to any extent, provided no new cause of action in substance is added;<sup>17</sup> as amendments substantially changing the claim or defense can not properly be granted at any time;<sup>18</sup> and the court

<sup>13</sup> *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 46; *Story's Eq. Pl.* 884; *Shields v. Barrow*, 17 How. (U. S.) 130. Where a complaint praying for legal relief states a cause of action entitling the plaintiff to equitable relief, the court may on the trial permit the prayer to be amended, so as to ask for the appropriate equitable relief. *Walsh v. McKeen*, 75 Cal. 519

<sup>14</sup> *McMillan v. Dana*, 18 Cal. 349; *Kirstein v. Madden*, 38 id. 163.

<sup>15</sup> *Stringer v. Davis*, 30 Cal. 321. The right to amend is not an absolute, unconditional one, but is to be allowed in furtherance of justice, upon equitable terms and must be one which will not change substantially the claim or defense. *Kelsey v. Railroad Co.*, 1 S. Dak. 80. A plaintiff is not permitted, under the guise of an amendment, to substitute for the original cause of action a new and different one. *Davis v. Johnson*, 4 Col. App. 545; *People v. Mfg. Co.*, 107 Cal. 256.

<sup>16</sup> *Hayden v. Hayden*, 46 Cal. 333.

<sup>17</sup> *Hollister v. Livingston*, 9 How. Pr. 140. Amendment to pleadings should be liberally allowed. See *Gould v. Stafford*, 101 Cal. 32; *Burns v. Scooffy*, 98 id. 271; *Wixon v. Devine*, 91 id. 477; *McCausland v. Ralston*, 12 Nev. 195; *Carson v. Railsback*, 3 Wash. Ter. 163; *Garrison v. Goodale*, 23 Oreg. 307; *Baldock v. Atwood*, 21 id. 73; *Foste v. Standard Ins. Co.*, 26 id. 451. But where objections are raised in the court below, and parties, instead of applying for leave to amend, succeed in procuring rulings in their favor by the trial court, they do so at their peril. *Robinson, etc., Min. Co. v. Johnson*, 13 Col. 258.

<sup>18</sup> *Bailey v. Johnson*, 1 Daly, 61; *Woodruff v. Dickie*, 31 How. Pr. 164; *Ransom v. Wetmore*, 39 Barb. 104; *Whitcomb v. Hungerford*, 42 id. 177; *Foste v. Standard Ins. Co.*, 26 Oreg. 449. That an amendment, made of course, may add a new cause of action, see *Mason v. Whitely*, 4 Duer, 611; 1 Abb. Pr. 85; *Wyman v.*

should not allow a new and wholly different case to be made.<sup>19</sup> A court of chancery should rarely if ever permit amendments so changing the character of the pleadings as to make substantially a new case after the cause has been set for hearing, much less after it has been tried.<sup>20</sup> Plaintiff may amend by a new count, introductive of a new cause of action, if it correspond in character with the original count in a kindred cause, admitting the same pleading and defense, and which might have been included in the original declaration.<sup>21</sup> For the purpose of determining whether new matter is entirely foreign to the cause of action in the original complaint, the original complaint must be liberally construed.<sup>22</sup> Plaintiff can not amend so as to change an action *ex contractu* to one *ex delicto*;<sup>23</sup> nor to change the mode of trial;<sup>24</sup> nor can the plaintiff in ejectment set up title acquired after commencement of suit.<sup>25</sup> So, also, facts which occur subsequent to filing the complaint, and which change the liabilities of the defendants, can not be incorporated by amendment.<sup>26</sup>

An amendment may strike out a cause of action.<sup>27</sup> An amended pleading can not set up matter which occurred after suit brought.<sup>28</sup> It must be presented by supplemental pleading.

Redmond, 18 How. Pr. 272; Macqueen v. Babcock, 13 Abb. Pr. 268; but see Woodruff v. Dickie, 5 Rob. 619; Davis v. Johnson, 4 Col. App. 545.

<sup>19</sup> Verplanck v. Mercantile Ins. Co., 1 Edw. Ch. 46; Roush v. Fort, 3 Mont. 175; Story's Eq. Pl. 884; Shields v. Barrow, 17 How. (U. S.) 130; Schofield v. Fitzhugh, 1 Cranch C. C. 108; The Harmony, 1 Gall. 123.

<sup>20</sup> Walden v. Bodley, 14 Pet. 156.

<sup>21</sup> Tiernan v. Woodruff, 5 McLean, 135.

<sup>22</sup> Nevada Co. & Sac. Canal Co. v. Kidd, 28 Cal. 673.

<sup>23</sup> 1 Van Santv. Pl. 768; Ramirez v. Murray, 5 Cal. 222; Lane v. Beany, 19 Barb. 51; 1 Abb. Pr. 65; or *vice versa*, Hackett v. Bank of California, 57 Cal. 335; Baldwin v. Rood, 49 Hun, 605; Mea v. Pierce, 63 id. 400.

<sup>24</sup> McCarty v. Edwards, 24 How. Pr. 236; Craig v. Hyde, id. 313.

<sup>25</sup> Smith v. Billet, 15 Cal. 26.

<sup>26</sup> Van Maren v. Johnson, 15 Cal. 308; Woodruff v. Dickie, 31 How. Pr. 164; Sheldon v. Adams, 18 Abb. Pr. 405; S. C., 41 Barb. 54; S. C., 27 How. Pr. 179.

<sup>27</sup> Watson v. Rushmore, 15 Abb. Pr. 51.

<sup>28</sup> Hornfager v. Hornfager, 6 How. Pr. 13; Lampson v. McQueen, 15 id. 345. The fact that new matter set up by way of amendment was known to the defendant at the time of filing his original answer is no reason why the amendment should not be permitted. Sharon v. Sharon, 77 Cal. 102; see Dorn v. Baker, 76 id. 206.

In an action for a fraudulent sale of a mine, an amendment striking out the offer to return the deed does not change the issues tendered.<sup>29</sup> A plaintiff may amend by filing a more full and particular account.<sup>30</sup> The complaint may be amended, within the time limited, by setting forth a new cause of action, and is not restricted to a cause of action of the same class as that in the original complaint, though all the causes set forth in the amended complaint must be of the same class and of a class to which the summons is appropriate.<sup>31</sup> In California, as a rule, the courts are extremely liberal as to amendments.

**§ 4446. Amendments of course.** Amendments of course may be made, without costs to either party, to a pleading at any time before answer or demurrer filed, or after demurrer and before the trial of the issue of law thereon.<sup>32</sup> But a party shall not so amend more than once. If defendant demurs to the complaint, it is an error for the court to refuse the plaintiff leave to amend his complaint before the decision on the demurrer;<sup>33</sup> but he can not amend a second time without leave of the court.<sup>34</sup> After demurrer, and before argument and submission of the issue thereon, either party may amend a pleading, by filing the same as amended, and serving a copy on the adverse party or his attorney, who has ten days to answer or demur thereto.<sup>35</sup>

The right to amend as of course is absolute, and can not be interfered with, unless the amendment is merely colorable, and made for purposes of delay only.<sup>36</sup> And though absolute, it may be waived, either by express notice or noticing cause for

<sup>29</sup> *Ahrens v. Adler*, 33 Cal. 608.

<sup>30</sup> *Estate of Hidden*, 23 Cal. 362; *Valencia v. Couch*, 32 id. 339; 91 Am. Dec. 589. How far the discretion of the court in allowing amendments so as to change the form of action is restricted by the Code, discussed in *Brown v. Babcock*, 3 How. Pr. 305; *Spalding v. Spalding*, id. 297; *Forniss v. Brown*, 8 id. 59.

<sup>31</sup> *Brown v. Leigh*, 49 N. Y. 78; S. C., 12 Abb. Pr. (N. S.) 193.

<sup>32</sup> Cal. Code Civ. Pro., § 472; N. Y. Code, § 542; 1 Van Santv. Pl. 792; 1 Whitt. Pr. 611; 1 Barb. Ch. Pl. 206; *Allen v. Marshall*, 34 Cal. 165; *Lord v. Hopkins*, 30 id. 76; *Barber v. Reynolds*, 33 id. 497.

<sup>33</sup> *Lord v. Hopkins*, 30 Cal. 76.

<sup>34</sup> *Sands v. Calkins*, 30 How. Pr. 1; *Jerollman v. Cohen*, 1 Duer, 631; *White v. Mayor of N. Y.*, 5 Abb. Pr. 322; S. C., 14 How. Pr. 495.

<sup>35</sup> Cal. Code Civ. Pro., § 472.

<sup>36</sup> *Griffin v. Cohen*, 8 How. Pr. 451; *Rogers v. Rathbun*, id. 466; *Thompson v. Minford*, 11 id. 273; *Spencer v. Tooker*, 12 Abb. Pr. 353.

trial.<sup>37</sup> A party may amend of course where the same amendment would be allowed at the trial.<sup>38</sup> An amendment that would have the effect of changing the parties to the action will not be allowed unless there is something in the record to amend by.<sup>39</sup> Nor, without amending the summons, can the names of additional defendants be introduced.<sup>40</sup> And a summons can not be amended without leave of court.<sup>41</sup> An amendment of course will not be allowed which sets up a different claim. By claim is meant the particular relief sought; though the cause of action, that is the statement of facts, may be amended.<sup>42</sup> But an amendment could be allowed by inserting a count for goods sold and delivered without terms, and allowing the trial to proceed; such is not a case changing substantially the claim.<sup>43</sup> And "other allegations material to the case" may be introduced.<sup>44</sup>

**§ 4447. Amendment by leave of court.** The judge presiding at the trial has full power of amendment of pleadings.<sup>45</sup> But a referee can not order an amendment. And after the case is submitted the referee can not allow the plaintiff to introduce an amended complaint, and compel the defendant to file an amended answer.<sup>46</sup> In New York the power of the referee to allow amendments at the trial is the same as that of the judge, and his exercise of discretion will rarely be interfered with.<sup>47</sup>

<sup>37</sup> 1 Van Santv. Pl. 796; *Cusson v. Whalon*, 5 How. Pr. 305.

<sup>38</sup> *Getty v. Hudson River R. R. Co.*, 6 How. Pr. 269.

<sup>39</sup> *Lake v. Morse*, 11 Ill. 587; *Chase v. Dunham*, 1 Paige Ch. 572; but see Cal. Code Civ. Pro., § 473; N. Y. Code, § 542. A complaint may be amended by changing a party from defendant to plaintiff, under Oregon practice (Hill's Code, § 101), permitting pleadings to be amended by striking out or adding the name of a party. *Liggett v. Ladd*, 23 Oreg. 26. Amendment of complaint by dropping names of parties. See *Ware v. Walker*, 70 Cal. 591.

<sup>40</sup> *Follower v. Laughlin*, 12 Abb. Pr. 105.

<sup>41</sup> *Walkenshaw v. Purzell*, 32 How. Pr. 310; see § 3902, *ante*.

<sup>42</sup> *Chapman v. Webb*, 6 How. Pr. 390.

<sup>43</sup> *Harrington v. Slade*, 22 Barb. 161; *Troy, etc., R. R. Co. v. Tibbits*, 11 How. Pr. 168; *Vibbard v. Roderick*, 51 Barb. 616.

<sup>44</sup> *Jeroliman v. Cohen*, 1 Duer, 632; *Baldock v. Atwood*, 21 Oreg. 73. The above are not all good authority in California, but may be consulted with profit.

<sup>45</sup> See Cal. Code Civ. Pro., §§ 469, 470.

<sup>46</sup> *De la Riva v. Berreyesa*, 2 Cal. 195.

<sup>47</sup> N. Y. Code Civ. Pro., § 1018; *Dougherty v. Valloton*, 6 Jones & Sp. (N. Y.) 455; *Smith v. Pelott*, 63 Hun, 632; *Hall v. Abells*, 57 Hun, 589.

Amendments should be liberally allowed by the court, in furtherance of justice.<sup>48</sup> But the refusal to allow them is presumed to be right, unless the character of the proposed amendment is shown on the record.<sup>49</sup> Amendments are within the discretion of the court, and can not be controlled by *mandamus*,<sup>50</sup> and are governed by their own rules and modes of practice.<sup>51</sup> Where the pleading is defective, demurrer should be sustained, and leave be granted to amend.<sup>52</sup> And if the plaintiff then declines, final judgment should be given,<sup>53</sup> unless the complaint is so defective that it can not be made good by amendment.<sup>54</sup> After demurrer sustained, amendments may be made upon motion.<sup>55</sup> The party desiring amendment after demurrer sustained, must make his motion to the court, and he can not object on appeal that he was not permitted to amend when he made no offer.<sup>56</sup> After demurrer sustained, defendant may be

<sup>48</sup> 1 Van Santv. Pl. 809; McMillan v. Dana, 18 Cal. 339; Roland v. Kreyenhagen, id. 455; Pierson v. McCahill, 22 id. 127; Stringer v. Davis, 30 id. 321; Vanderbilt v. Access. Transit Co., 9 How. Pr. 352; § 4444, *ante*.

<sup>49</sup> Jessup v. King, 4 Cal. 331.

<sup>50</sup> Smith v. Jackson, 1 Paine, 453; to the same effect, *Ex parte Bradstreet*, 7 Pet. 634. An application to amend a pleading is addressed to the sound discretion of the trial court. See *Emeric v. Alvarado*, 90 Cal. 444; *Daley v. Russ*, 86 id. 114; *Barnes v. Packwood*, 10 Wash. St. 50; *Hammond v. Foster*, 4 Mont. 421; *Billings v. Sanderson*, 8 id. 201; and will not be reviewed on appeal except for an abuse of such discretion. *Garrison v. Goodale*, 23 Oreg. 307; *Belmont Min. Co. v. Costigan*, 21 Col. 471; *Buno v. Garner*, 3 Col. App. 456; *Silsby v. Frost*, 3 Wash. Ter. 388; *Wixon v. Devine*, 91 Cal. 477; *Cheney v. O'Brien*, 69 Col. 200; *Wallace v. Baisley*, 22 Oreg. 572; *Hexter v. Schnelder*, 14 id. 184; *Gould v. Gleason*, 10 Wash. St. 476; *Ditch Co. v. Canal Co.*, 67 Cal. 577; *County of Siskiyou v. Gamlich*, 110 Cal. 94.

<sup>51</sup> *Wright v. Hollingworth*, 1 Pet. 165; *United States v. Buford*, 3 id. 12.

<sup>52</sup> *Gallagher v. Delaney*, 10 Cal. 410.

<sup>53</sup> Id.

<sup>54</sup> *Lord v. Hopkins*, 30 Cal. 76. If a complaint has been amended twice, the refusal of the court to allow a third amendment is not an abuse of discretion. *Balch v. Smith*, 4 Wash. St. 497. And leave to the plaintiff to amend his complaint may be refused if the court is able to see that it can not be so amended as to state a good cause of action. *People v. Mfg. Co.*, 107 Cal. 256.

<sup>55</sup> *Smith v. Yreka Water Co.*, 14 Cal. 201; *Gallagher v. Delaney*, 10 id. 410.

<sup>56</sup> *Smith v. Yreka Water Co.*, 14 Cal. 201.

allowed to amend.<sup>57</sup> After demurrer to defendant's answer sustained, it is in the discretion of the court to allow defendant to amend.<sup>58</sup> Demurrer sustained, and plaintiff amends by making two counts instead of one. He can not, after trial, complain of error in sustaining the demurrer.<sup>59</sup> So, also, if one defendant demurs to a complaint for misjoinder of another defendant, and the complaint is accordingly amended to obviate the objection by omitting the defendant wrongfully joined, a subsequent demurrer for failing to join such omitted defendant should not be sustained.<sup>60</sup> To test the ruling on the demurrer, he should have gone to trial on the pleadings where the judgment on demurrer left them.<sup>61</sup> In demurrer overruled to defective complaint, if defendant answers over, court will treat such complaint as amended.<sup>62</sup>

The filing of a new complaint after demurrer sustained is not the commencement of a new action.<sup>63</sup> So of an amended answer which supersedes the original.<sup>64</sup> They simply take the place of the originals;<sup>65</sup> and copies of the instruments sued on must be annexed thereto.<sup>66</sup> All amendments, which are not permitted of course under the sections of the Code before quoted, must be authorized by the court. Section 473 of the California Code of Civil Procedure provides that "the court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or strik-

<sup>57</sup> *Pierson v. McCahill*, 22 Cal. 127; *Fish v. Reddington*, 31 id. 186.

<sup>58</sup> *Gillan v. Hutchinson*, 16 Cal. 153.

<sup>59</sup> *Gale v. Tuolumne Water Co.*, 14 Cal. 25. Where a demurrer to a complaint has been properly sustained, and it does not appear that any leave was asked to amend the complaint, the judgment for the defendant, rendered upon the sustaining of the demurrer, will not be reversed, on the ground that leave to amend was not granted. *Barker v. Freeman*, 85 Cal. 533. After demurrer to a complaint is sustained, and the plaintiff, instead of amending, as given leave to do, appeals, the appellate court, in affirming the order, may, unless there has been a judgment rendered, which it also affirms, grant leave to amend. *Greely v. McCoy*, 3 S. Dak. 624, distinguishing *People v. Jackson*, id. 624.

<sup>60</sup> *James v. Leport*, 4 West Coast Rep. 584.

<sup>61</sup> *Gale v. Tuolumne Water Co.*, 14 Cal. 25.

<sup>62</sup> *Ward v. Moorey*, 1 Wash. Ter. 104.

<sup>63</sup> *Jones v. Frost*, 28 Cal. 245.

<sup>64</sup> *Id.*; *Gilman v. Cosgrove*, 22 id. 356.

<sup>65</sup> *Barber v. Reynolds*, 33 Cal. 497; *Sands v. Calkins*, 30 How. Pr. 1.

<sup>66</sup> *McEwen v. Hussey*, 23 Ind. 395.

ing out the name of any party, or by correcting a mistake in the name of any party, or a mistake in any other respect; and may upon like terms enlarge the time for answer or demurrer. The court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars," etc. This section omits the words "upon affidavit showing good cause therefor," contained in section 68 of the Practice Act. Sections 542 and 723 of the New York Code of Civil Procedure correspond substantially with the section above quoted.

§ 4448. **Amendments at trial.** The allowance of amendments at the trial is in the discretion of the court,<sup>67</sup> and that discretion will rarely be revised,<sup>68</sup> but for its abuse, the appellate court will interfere.<sup>69</sup> Where from oversights of counsel, committed under pressure of business, pleadings are defective, amendments should be allowed with great liberality. In such cases, when an offer to amend is made at such a stage of the proceedings that the other party will not lose an opportunity to fairly present his whole case, amendments should be allowed with great liberality.<sup>70</sup>

Where the defendant lies by until trial, before objecting to the sufficiency of the complaint, it is a proper exercise of discretion in the court or referee to allow the necessary allegations to be supplied by amendment, if they do not amount to a new cause of action.<sup>71</sup> But leave to amend allegations filed against an insolvent debtor, by inserting the name of another creditor, was refused after the jury was sworn.<sup>72</sup> No material amendment can be allowed after the cause has been submitted to the jury, or a finding has been announced by a court.<sup>73</sup> Where, in the course of a trial, it is discovered that pleadings are so defective that the real subject of dispute can not be finally determined, the court should allow amendments on such terms

<sup>67</sup> Van Santv. Pl. 812, 818; 1 Whitt. Pr. 617; Puterbaugh's Ill. Pr. 526; Jackson v. Warren, 32 Ill. 331; Thornton v. Borland, 12 Cal. 438; Gillan v. Hutchinson, 16 id. 153; Cooke v. Spears, 2 id. 438; Stearns v. Martin, 4 id. 227; and see Gwynn v. Butler, 17 Col. 114; Wild v. Railroad Co., 21 Oreg. 159.

<sup>68</sup> Pierson v. McCahill, 22 Cal. 127.

<sup>69</sup> Cooke v. Spears, 2 Cal. 409; see § 4442, *ante*, and cases cited.

<sup>70</sup> Kirstein v. Madden, 38 Cal. 163.

<sup>71</sup> Woolsey v. Trustees of Rondout, 2 Keyes, 603.

<sup>72</sup> Newton's Case, 2 Cranch C. C. 467.

<sup>73</sup> Holcraft v. King, 25 Ind. 352.



as may be just,<sup>74</sup> at any time after the commencement of the trial;<sup>75</sup> or after a motion for nonsuit, if it would not operate as a surprise upon the defendant.<sup>76</sup> It is always in time when it immediately follows an objection to the pleading, and does not come too late because made after plaintiff has closed his testimony.<sup>77</sup> And after defendants have closed their case, and before the case is submitted, plaintiffs may be allowed to supply an omission in the testimony occasioned by mistake or inadvertence.<sup>78</sup> A complaint may be amended before judgment and after verdict, so as to conform to the verdict.<sup>79</sup> And, therefore, can not be allowed in the appellate court,<sup>80</sup> unless the appeal be taken from judgment on demurrer,<sup>81</sup> or from an order denying a new trial.<sup>82</sup> Defendant may amend by inserting new matter,<sup>83</sup> if not entirely foreign to the cause of action.<sup>84</sup> The fact that such new matter was well known to defendant at the time the original answer was filed is no good reason why the amend-

<sup>74</sup> *Stringer v. Davis*, 30 Cal. 318.

<sup>75</sup> *Peters v. Foss*, 16 Cal. 357; *Gavitt v. Doub*, 23 id. 79. Amendments during trial. See *Randall v. Greenhood*, 3 Mont. 506; *Palmer v. McMasters*, 6 id. 172; *Wild v. Railway Co.*, 21 Oreg. 159.

<sup>76</sup> *Farmer v. Cram*, 7 Cal. 135; *Valencia v. Couch*, 32 id. 339; 91 Am. Dec. 589.

<sup>77</sup> Id. Amendment of pleading should be allowed at any stage of the trial when it is necessary for the purposes of justice. *Farmers', etc.*, *Bank v. Stover*, 60 Cal. 388; and see *Walsh v. McKeen*, 75 id. 519; *Doane v. Houghton*, id. 360; *Boroino v. Railroad Co.*, 86 id. 416; *Milch v. Fire Ins. Co.*, 31 N. Y. Supp. 788. A court may allow a formal amendment to a complaint after the trial and during the argument. *Hall v. Rice*, 64 Cal. 443.

<sup>78</sup> *Priest v. Union Canal Co.*, 6 Cal. 170. Amendment of pleading should be allowed at any stage of the trial when it is necessary for the purposes of justice. *Farmers', etc.*, *Bank v. Stover*, 60 Cal. 388; and see *Walsh v. McKeen*, 75 id. 519; *Doane v. Houghton*, id. 360; *Boroino v. Railroad Co.*, 86 id. 416; *Milch v. Fire Ins. Co.*, 31 N. Y. Supp. 788. A court may allow a formal amendment to a complaint after the trial and during the argument. *Hall v. Rice*, 64 Cal. 443.

<sup>79</sup> *Hooper v. Wells*, 27 Cal. 35.

<sup>80</sup> Id.

<sup>81</sup> *Phelan v. Supervisors*, 9 Cal. 15.

<sup>82</sup> *Argenti v. San Francisco*, 30 Cal. 458.

<sup>83</sup> *Pierson v. McCahill*, 22 Cal. 127.

<sup>84</sup> *Nevada & Sac. Co. Canal Co. v. Kidd*, 28 Cal. 673. If an amended answer constitutes no defense to the action, leave to file the same may be properly refused. *Bransford v. Insurance Soc.*, 21 Col. 34.



ment should not be permitted.<sup>85</sup> Defendant may amend by striking out counterclaim, and setting up the defense of the Statute of Limitations.<sup>86</sup> Or one of two defendants may be permitted severally to plead the statute, by filing a separate plea.<sup>87</sup> It is not error to refuse to permit the defendant to set up the Statute of Limitations after he has answered to the merits.<sup>88</sup>

A defendant, by amending his answer, and taking issue on a new cause of action added to the complaint by amendment, waives all objection to such amendment.<sup>89</sup> Under the Code of Louisiana, which allows general and special pleas if not inconsistent with each other, an amended answer, which but specifies a particular fact in aid of the general denial, is allowable.<sup>90</sup> If the plaintiff amends his complaint, and the defendant obtains an order to have his answer on file stand as the answer to the amended complaint, the answer is to be treated as if filed when the order is made.<sup>91</sup> An answer may be verified even at the close of the plaintiff's case.<sup>92</sup> If the defendant does not know that too many are joined as plaintiffs till after the same appears in evidence, he should then apply for leave to amend his answer.<sup>93</sup> If testimony offered by defendant is rejected because of a defective denial, defendant should be allowed to amend his denial.<sup>94</sup> If defendant have acquired title to the demanded premises during litigation, and has not pleaded such title in a supplemental answer, it is not error to refuse to permit him on the trial to amend his answer so as to obviate the objection to the introduction of testimony excluded by the court under the original answer.<sup>95</sup> But if the court refuses to allow the

<sup>85</sup> Pierson v. McCahill, *supra*; § 4448, *ante*.

<sup>86</sup> Wynan v. Remond, 18 How. Pr. 272; Hibernia, etc., Loan Soc. v. Jones, 89 Cal. 507; Morgan v. Morgan 10 Wash. St. 99.

<sup>87</sup> Robinson v. Smith, 14 Cal. 244.

<sup>88</sup> Stuart v. Lander, 16 Cal. 375; and see Owers v. Min. Co., 6 Col. App. 1.

<sup>89</sup> Secor v. Law, 9 Bosw. 163; and see Bell v. Wandby, 4 Wash. St. 743. So, the filing of an amended answer is a waiver by a defendant of any objection to the ruling of the court, sustaining a motion to strike out an original answer. Hexter v. Schneider, 14 Oreg. 184.

<sup>90</sup> Andrews v. Hensler, 6 Wall. 254.

<sup>91</sup> Mulford v. Estudillo, 32 Cal. 131.

<sup>92</sup> Arrington v. Tupper, 10 Cal. 464; Lattimer v. Ryan, 20 id. 628.

<sup>93</sup> Gillam v. Sigman, 29 Cal. 637; Ackley v. Tarbox, 31 N. Y. 564.

<sup>94</sup> Stringer v. Davis, 30 Cal. 318.

<sup>95</sup> McMinn v. O'Connor, 27 Cal. 238.

amendment, and evidence shows that the amendment would be immaterial, no injury results from the refusal.<sup>96</sup>

§ 4449. **Amendments after trial.** Amendments after trial are allowed only with great caution, and on good cause shown.<sup>97</sup> In New York amendments may be made after judgment.<sup>98</sup> The court, in its discretion, has an extraordinary power, even after judgment, to allow a pleading to be amended by inserting new allegations material to the case, but this power should be very sparingly exercised.<sup>99</sup> Errors in the computation of interest may be corrected by motion in the court below.<sup>100</sup> A mere clerical error in the judgment, not affecting the appellant, can be corrected, and is not ground for reversal.<sup>101</sup> A court has the power to make an amendment *nunc pro tunc* by supplying the omission of a clerk to enter the appointment of a guardian *ad litem*.<sup>102</sup> Where the decree is defective in not designating the defendants who are personally liable for the debt, and the record shows who they are, the court has the power to amend the judgment at any time by adding a clause designating the defendants who are personally liable. The proper remedy in such a case is to move to amend the judgment by supplying the omission.<sup>103</sup> When the judgment entered by the clerk does not conform to that pronounced by the court, it will be corrected on motion, even after an appeal and affirmance of the judgment, and the issuing and service of an execution in the cause.<sup>104</sup> Where the complaint might have been

<sup>96</sup> Jones v. Black, 30 Cal. 227.

<sup>97</sup> Van Santv. Pl. 814; Houghton v. Skinner, 5 How. Pr. 420.

<sup>98</sup> Code, §§ 722, 723. In Montana, even after judgment leave to amend so that the issue in the pleadings should correspond with the proof should be allowed in furtherance of justice, on terms. Hershfield v. Aiken, 3 Mont. 442; Ramsey v. Cattle Co., 6 id. 500.

<sup>99</sup> Field v. Hawkhurst, 9 How. Pr. 75; Malcom v. Baker, 8 id. 301; Egert v. Wicker, 10 id. 183. Amendment after verdict. See Arrigo v. Catalano, 27 N. Y. Supp. 995; Hopf v. Baking Co., 21 id. 589; Frankfurter v. Home Ins. Co., 31 id. 3; Mea v. Pierce, 63 Hun, 400. Amending pleadings after reversal of judgment. Horn v. Reitler, 15 Col. 316.

<sup>100</sup> Whitney v. Buckman, 13 Cal. 536.

<sup>101</sup> Anderson v. Parker, 6 Cal. 197.

<sup>102</sup> Sprague v. Litherberry, 4 McLean, 442.

<sup>103</sup> Leviston v. Swan, 33 Cal. 480.

<sup>104</sup> Rousset v. Boyle, 45 Cal. 64. Pending an appeal, the trial court has no jurisdiction to allow an amendment to any pleading. Kirley v. Superior Ct., 68 Cal. 604. But a court has power to vacate a

amended on the trial, and proof is given sufficient to constitute a cause of action, the court after the trial will amend the complaint *nunc pro tunc*.<sup>105</sup> The verdict of a jury may be amended where there is no doubt as to the facts.<sup>106</sup> A judgment may be amended by substituting leave to serve a new complaint in place of dismissal without prejudice so as to save the Statute of Limitations.<sup>107</sup> Judgment in replevin for value of property, instead of in alternative for delivery or value, may be corrected on motion.<sup>108</sup> Signature to jurat to affidavit of "no answer" may be added after entry of judgment.<sup>109</sup> And a judgment record may be amended by filing affidavit of no answer.<sup>110</sup> The court below, while an appeal is pending in the Court of Appeals, have control of the judgment for the purpose of making amendments.<sup>111</sup> The Supreme Court has no power to amend the record brought into it on an appeal from an inferior court.<sup>112</sup> An omission of an averment necessary to give jurisdiction can not be amended after judgment.<sup>113</sup>

The court has power to authorize amendments when there is anything in the record to amend by,<sup>114</sup> such as clerical errors in its own records, even after a great lapse of time, and without any notice to the parties, and without their presence; and such action can not be questioned by another court, even upon error.<sup>115</sup> A court may at any time render or amend a judgment *nunc pro tunc*, where the record discloses that it is in-

judgment at the term at which it was rendered, and permit the pleadings in the case to be amended, notwithstanding an appeal from the judgment has been perfected. *Higgins v. The People*, 2 Col. App. 567.

<sup>105</sup> *Coleman v. Pleystead*, 36 Barb. 27; S. C., on appeal, 40 N. Y. 341.

<sup>106</sup> *Emerson v. Bleakley*, 5 Abb. Pr. (N. S.) 350. The common-law right to amend a verdict after the jury is discharged has not been abrogated by the Oregon Code. *Osborne v. Morris*, 21 Oreg. 367; and see, also, *Humphrey v. Mayor, etc.*, 48 N. J. L. 588; *Dalrymple v. Williams*, 63 N. Y. 361; 20 Am. Rep. 544.

<sup>107</sup> *N. Y. Ice Co. v. N. W. Ins. Co.*, 23 N. Y. 357.

<sup>108</sup> *Young v. Atwood*, 5 Hun, 234.

<sup>109</sup> *Fawcett v. Vary*, 59 N. Y. 597.

<sup>110</sup> *Tradesman's Nat. Bank v. McFeeley*, 3 Hun, 699.

<sup>111</sup> *Judson v. Gray*, 17 How. Pr. 289; to the contrary, *Bryan v. Berry*, 8 Cal. 473; 68 Am. Dec. 345.

<sup>112</sup> *Gould v. Glass*, 19 Barb. 179.

<sup>113</sup> *Smith v. Jackson*, 2 Paine C. C. 486; compare *Fisher v. Rutherford*, 1 Baldw. 188.

<sup>114</sup> *Randolph v. Barrett*, 16 Pet. 138.

<sup>115</sup> *Cromwell v. The Bank of Pittsburg*, 2 Wall. jun. C. C. 569.

correctly given as the judgment of the court.<sup>116</sup> While the term lasts, the court has power to amend the records. After the term has passed, the record can not be amended, unless there is something in the record to amend by.<sup>117</sup> Under section 473 of the California Code of Civil Procedure, the court may relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him, through his mistake, inadvertence, surprise, or excusable neglect; and where, for any reason satisfactory to the court or the judge thereof, the party aggrieved has failed to apply for the relief

<sup>116</sup> Morrison v. Dapman, 3 Cal. 255.

<sup>117</sup> Branger v. Chevallier, 9 Cal. 172. *Amendment of judgment or record.*—A court has inherent power to resettle its own order so as to conform it to the actual adjudication. Robertson v. Hay, 33 N. Y. Supp. 31; and see Granite, etc., Assoc., 88 Hun, 617; Olcott v. Kohlsaat, 55 id. 607. A trial court has the power, at a subsequent term, to modify or correct a judgment or record to such an extent that the relief granted may be such as was intended to be granted originally. Keene v. Welsh, 8 Mont. 305; Territory v. Clayton, id. 1. A clerical error in the entry of a judgment, where it is shown by the record, may be corrected on motion even after an appeal and affirmance of the judgment. Dreyfuss v. Tompkins, 67 Cal. 339; Breene v. Booth, 3 Col. App. 470. But a judgment against a party sued by a wrong name, and not appearing in the action, is a nullity incapable of amendment. Schoelkopf v. Ohmeis, 32 N. Y. Supp. 736. Proceedings under sections 989 to 994, California Code of Civil Procedure, for the purpose of binding a partner by a judgment recovered against his copartner, are in the nature of an action upon a judgment, and neither the pleadings nor the judgment in the original action can be amended. Waterman v. Lipman, 67 Cal. 26. Every court of record has inherent power to amend its record to correspond with the actual facts, and this power may be exercised at any time. Kaufman v. Shain, 111 Cal. 16; Crim v. Kessing, 89 id. 486; 23 Am. St. Rep. 491; Frink v. Frink, 43 N. H. 508; 80 Am. Dec. 189. It may amend its record *nunc pro tunc* so as to make the record express what was done at the time. Breene v. Booth, 3 Col. App. 470; and see Carter v. Koshland, 12 Oreg. 492. But a court has no power, under the forms of an amendment, to correct a judicial error, or to make of record an order not in fact given. Egan v. Egan, 90 Cal. 15. The rule that after the term there can be no amendment of a record unless there is something in the record to amend by, does not apply to the amendment of minute entries or orders of court not forming a part of the judgment-roll. These may be amended by the court to correspond with the facts upon any competent evidence showing what were the facts, and that a mistaken entry was made by the clerk. Kaufman v. Shain, 111 Cal. 16.

sought during the term at which such judgment, order, or proceeding complained of was taken, the court, or the judge thereof in vacation, may grant the relief upon application made within a reasonable time, not exceeding six months after the adjournment of the term. Under the same section, a defendant who has not been personally served may be allowed, upon just terms, at any time within one year after the rendition of the judgment, to answer to the merits of the original action. Where, on appeal from any order granting a new trial, the Supreme Court affirmed the "judgment" below, and the *remittitur* was issued, and then, at a subsequent term, respondent moved the court to amend its judgment by making it read, "the order of the District Court granting a new trial is affirmed," instead of, "the judgment is affirmed," it was held that the motion will be granted, on the principle that courts have the power to amend clerical errors, and enter a judgment *nunc pro tunc*, where the record itself discloses the error, even though the term has elapsed. Costs of motion are not allowed.<sup>118</sup> After an appeal in which judgment on the demurrer sustained is affirmed, plaintiff can not be granted leave to amend complaint.<sup>119</sup> Where a demurrer to a complaint is sustained in the court below, and plaintiff declines to amend, and appeals from the judgment and the order sustaining the demurrer, the Supreme Court, if it affirm the judgment, can not grant plaintiff leave to amend his complaint.<sup>120</sup> When a final judgment, on demurrer to the complaint, sustaining the demurrer, was reversed, the plaintiff had the right to amend on application to the court below.<sup>121</sup>

Upon the trial, every material allegation of the complaint not specifically controverted is to be taken as true; but if the defendant supposed he had denied material allegations, and the court sustained his view of the answer, the appellate court, when it reverses the judgment, may allow the court below to exercise its discretion in permitting the answer to be amended.<sup>122</sup> Thus, where a judgment in favor of defendant had been reversed

<sup>118</sup> *Swain v. Naglee*, 19 Cal. 127. Amendment of writ of error *nunc pro tunc*, as of the date of the writ. See *Board of Commissioners, etc. v. Railroad Co.*, 3 N. Mex. 352.

<sup>119</sup> *Bryan v. Berry*, 8 Cal. 134; *People v. Jackson*, 24 id. 633.

<sup>120</sup> Id.

<sup>121</sup> *Williamson v. Blattan*, 9 Cal. 500; *Phelan v. City of San Francisco*, id. 15; *McDonald v. Bear River Water & Mining Co.*, 15 id. 149.

<sup>122</sup> *Fish v. Reddington*, 31 Cal. 186.

by the Supreme Court, on the ground that certain material evidence which had been received in his favor, was inadmissible under his answer, and on the second trial defendant moved to amend his answer by inserting averments of new matter obviating the objection, it was held that as the amendment was evidently necessary to enable the defense to be fully presented, it was properly allowed by the court.<sup>123</sup> But where a defendant admits in his answer, under oath, a material allegation of the complaint, and the case is tried and judgment rendered, and afterwards a new trial is granted by the Supreme Court, the defendant should not be allowed to amend his answer by changing the admission into a denial.<sup>124</sup> On appeal taken by defendant immediately after judgment on default, on the ground of insufficiency of the affidavit of publication of summons, the appellate court will not disturb the judgment, the defendant having his remedy in the courts below within six months after judgment.<sup>125</sup> Upon the *remittitur* of a cause to the court below, if the plaintiffs desire to amend their complaint so as to present their legal rights for the determination of a jury, they should be permitted to do so.<sup>126</sup>

§ 4450. What amendments should be allowed. Plaintiffs should be permitted so to amend as to present for determination their legal rights;<sup>127</sup> or to express the cause of action originally intended;<sup>128</sup> or to strike out a cause of action;<sup>129</sup> or to strike out a claim for damages;<sup>130</sup> or to increase the amount of damages claimed,<sup>131</sup> even after issue joined;<sup>132</sup> or to change the venue.<sup>133</sup> If a wife should intervene in an action, or file a separate defense, plaintiff may amend.<sup>134</sup> A plaintiff may amend by inserting averments of prior appropriation, a diver-

<sup>123</sup> Pierson v. McCahill, 22 Cal. 127.

<sup>124</sup> Spanagel v. Reay, 47 Cal. 608.

<sup>125</sup> Guy v. Ide, 6 Cal. 99; 65 Am. Dec. 490.

<sup>126</sup> McDonald v. B. R. & A. W. & M. Co., 15 Cal. 149.

<sup>127</sup> Id. 145; Nevada & S. O. Co. v. Kidd, 28 Id. 673.

<sup>128</sup> Id.

<sup>129</sup> Watson v. Rushmore, 15 Abb. Pr. 51.

<sup>130</sup> Grass Valley Q. M. Co. v. Stackhouse, 6 Cal. 413.

<sup>131</sup> 1 Van Santv. Pl. 364; Gregg v. Gler, 4 McLean, 208; Frankfurter v. Home Ins. Co., 26 N. Y. Supp. 81.

<sup>132</sup> Merchant v. New York Life Ins. Co., 2 Sandf. 669.

<sup>133</sup> Stryker v. New York Exch. Bk., 42 Barb. 511.

<sup>134</sup> Moss v. Warner, 10 Cal. 296.

sion by defendants, with a prayer for an injunction.<sup>135</sup> In attachment, pending motion to dissolve the attachment, plaintiff may have leave to amend the complaint.<sup>136</sup> Circumstances authorizing an arrest, occurring subsequent to filing the complaint, should be set forth in a supplemental complaint.<sup>137</sup> Leave may be granted to fill blanks in complaint, and reply specially to plea of Statute of Limitations on payment of full costs.<sup>138</sup> A variance between the writ and the complaint in respect to the return-day may be amended.<sup>139</sup> The assignee may amend the assignment by inserting the words, "For value received, I hereby assign the within account."<sup>140</sup> A garnishee may amend his answer by correcting an error which could not reasonably have been avoided.<sup>141</sup> Petitions in railroad proceedings may be amended.<sup>142</sup> The omission to show an information, in the nature of a writ of *quo warranto*, that the offices usurped are corporate offices, may be amended.<sup>143</sup> In slander, by amendment, the words charged may be changed.<sup>144</sup> If the plaintiff mistakes his remedy, and brings an action at law for damages, when it should have been in equity for an accounting, but inserts some averments in the complaint, entitling him to some measure of equitable relief, the appellate court will send the case back with leave to amend the complaint.<sup>145</sup>

Where the proof does not sustain the allegations of the bill, and where, by the proof, the complainant would be entitled to relief in a court of equity if his pleadings had been properly framed, amendments may be allowed to conform the pleadings to the facts proved.<sup>146</sup> As to the propriety of allowing an

<sup>135</sup> Nevada & S. C. Co. v. Kidd, 28 Cal. 673.

<sup>136</sup> Hathaway v. Davis, 33 Cal. 161.

<sup>137</sup> Davis v. Robinson, 10 Cal. 411.

<sup>138</sup> Ferris v. Williams, 1 Cranch C. C. 281.

<sup>139</sup> Duvall v. Craig, 2 Wheat. 45; Wilder v. McCormick, 2 Blackf. 31.

<sup>140</sup> Ryan v. Maddox, 6 Cal. 247.

<sup>141</sup> Smith v. Browne, 5 Cal. 118.

<sup>142</sup> Contra Costa R. R. Co. v. Moss, 23 Cal. 325.

<sup>143</sup> Gunton v. Ingle, 4 Cranch C. C. 438.

<sup>144</sup> Dougherty v. Bentley, 1 Cranch C. C. 219.

<sup>145</sup> Blood v. Fairbanks, 48 Cal. 171.

<sup>146</sup> Stringer v. Davis, 30 Cal. 318; Connalley v. Peck, 3 id. 82; Tryon v. Sutton, 13 id. 494; 73 Am. Dec. 593; Valencia v. Couch, 32 Cal. 339; 91 Am. Dec. 589; Bedford v. Terhune, 30 N. Y. 453; 86 Am. Dec. 394; Walsh v. Washington Marine Ins. Co., 32 Cal. 427;



amendment to conform the pleadings to the facts proved, consult the authorities cited below. If evidence is objected to because the defense under which it is ordered is defectively pleaded, the court should allow the pleading to be amended.<sup>147</sup> In ejectment, amendments are liberally allowed.<sup>148</sup> The date of the devise may be amended so as to conform to the title,<sup>149</sup> or may extend the term of the fictitious lease even after judgment.<sup>150</sup> But amendments by adding a count stating a demise under a new title are not allowed, as distinct ejectments may be brought to try them.<sup>151</sup> A declaration in an action of ejectment, in which, according to the provisions of the laws of Tennessee, the defendant was held to bail, stated two demises, by citizens of different states. The cause coming on for trial before a jury, the plaintiffs suffered a nonsuit, which was set aside; and the court, on the motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of a citizen of another state; it was held that a judgment upon the new count was valid.<sup>152</sup>

§ 4450a. Amendment of complaint. The right to amend a complaint, even after leave granted, is limited to an accurate and correct expression of a cause of action which theretofore

Van Buskirk v. Stow, 42 Barb. 9. Allowance of amendments conforming pleadings to proofs. See Bean v. Stoneman, 104 Cal. 49; Ward v. Waterman, 85 Id. 488; Kamm v. Bank of California, 74 Id. 191; Bryan v. Tormey, 84 Id. 126; Williston v. Camp, 9 Mont. 88; Palmer v. Jones, 69 Hun, 240; Herendeen v. De Witt, 49 Id. 53; Flynn v. Westmayer, 4 N. Y. Supp. 188; Gallaher v. Cadwell, 3 Wash. Ter. 501. Where the complaint alleges a gift *inter vivos*, and evidence is introduced, without objection, showing a gift *causa mortis*, an amendment of the complaint to conform to the proofs is in furtherance of justice, and is properly allowed. Walsh v. Bowery Sav. Bank, 7 N. Y. Supp. 97; Id. 669; 15 Daly, 403. Where evidence is received without objection as to material matters not set up in the pleadings, a refusal of leave to amend so as to conform the pleadings to the real issue tried is reversible error. Cook v. Croisan, 25 Oreg. 475; and see Palmer v. McMasters, 6 Mont. 169; Greer v. Squire, 9 Wash. St. 359.

<sup>147</sup> Carpentier v. Small, 35 Cal. 346.

<sup>148</sup> Walden v. Craig, 9 Wheat. 576.

<sup>149</sup> Blackwell v. Patton, 7 Cranch, 471; Smith v. Vaughan, 10 Pet. 367; McDaniel v. Walles, 4 Cranch C. C. 201.

<sup>150</sup> Waldon v. Craig, 14 Pet. 147; Ledgerwood v. Pickett, 1 McLean, 143.

<sup>151</sup> Gale v. Babcock, 4 Wash. C. C. 199.

<sup>152</sup> Wright v. Hollingsworth, 1 Pet. 165.



had been inaccurately or insufficiently expressed.<sup>153</sup> Where the complaint on file is based upon a written lease and an assignment thereof, the former containing a forfeiture clause binding upon all parties, it is not error when the cause is about to be reached for trial to refuse to permit an amended complaint to be filed by which the written instrument is sought to be set aside or reformed so as to relieve the plaintiff entirely from the effects of the clause of forfeiture.<sup>154</sup> The amendment of the complaint during the progress of the trial is a matter within the discretion of the court, and no error can be founded thereon when it appears that no different answer was thereby required, and that the defendant was not taken by surprise, and did not ask for time to prepare an answer to the matters covered by the amendment.<sup>155</sup> An error in the admission of immaterial evidence is cured by a subsequent amendment of the complaint before the close of the trial, rendering the evidence material.<sup>156</sup> Pending a motion for a nonsuit, it is within the discretion of the court to permit the plaintiff to amend his complaint so as to conform to the evidence.<sup>157</sup> The privilege of amending a complaint after the trial of the issue of law, raised by demurrer, is in the discretion of the trial court, and where the demurrer is sustained without leave to amend, and nothing appears in the record to show an abuse of discretion, or that the plaintiff applied to the trial court for leave to amend, or took an exception to a refusal of the court to grant such leave, it is too late to raise the objection for the first time on appeal that the court failed to grant it.<sup>158</sup> The amendment of a complaint after a demurrer sustained thereto is a waiver of any error in sustaining the demurrer.<sup>159</sup> So, an error in overruling a demurrer to a complaint is cured if the plaintiff subsequently amend his complaint in the particular to which the demurrer was directed.<sup>160</sup> Pending the trial of an action, the court has power,

<sup>153</sup> *Rockwell v. Holcomb*, 3 Col. App. 1; *Givens v. Wheeler*, 6 Col. 149; see § 4447, *ante*.

<sup>154</sup> *Patrick v. Crowe*, 15 Col. 543.

<sup>155</sup> *Hulbert v. Brackett*, 8 Wash. St. 438.

<sup>156</sup> *Curtiss v. Life Ins. Co.*, 90 Cal. 245.

<sup>157</sup> *Kamm v. Bank of California*, 74 Cal. 191.

<sup>158</sup> *Buckley v. Howe*, 86 Cal. 596; *Smith v. Taylor*, 82 *id.* 553; see § 4447, *ante*; *Hawthorne v. Slegel*, 88 Cal. 159.

<sup>159</sup> *Ganecart v. Henry*, 98 Cal. 281; *Rockwell v. Holcomb*, 3 Col. App. 1.

<sup>160</sup> *Walsh v. McKeen*, 75 Cal. 519; see, also, *Madden v. Steamship Co.*, 86 *id.* 445; *Bell v. Wandby*, 4 Wash. St. 743.

upon such terms as may be just, to permit a second amended complaint to be filed, which embodies substantially the same allegations as the original complaint.<sup>161</sup>

**§ 4450b. The same — effect of amended complaint.** When an amended complaint is filed and served, the original ceases to perform any function as a pleading.<sup>162</sup> But an original is not superseded by an amended complaint for all purposes, and the former may be considered as a part of the record of the case for the purpose of showing when the action was commenced, and whether or not a new or different cause of action was introduced by the amendment upon the hearing of a demurrer raising those questions.<sup>163</sup> An amended complaint based upon the same cause of action relates back to the date upon which the original complaint was filed, as regards the Statute of Limitations.<sup>164</sup>

**§ 4450c. The same — amendment of, in particular actions.** In an action of ejectment to recover a quarter section of land described as being in "range 19 east," an amendment to the complaint describing the land as "range 20 east" is not the substitution of a new cause of action, and may properly be allowed.<sup>165</sup> In an action of partition, the bringing in of new parties, alleging that they have or claim an interest in the subject-matter of partition, is an amendment in matter of substance, requiring services of the amended complaint upon a defaulting defendant.<sup>166</sup>

**§ 4450d. The same — objection to original complaint.** Where an amended complaint, which is unobjectionable, has been filed

<sup>161</sup> *Riverside Land, etc., Co. v. Jensen*, 73 Cal. 550.

<sup>162</sup> *French Soc. v. Weldman*, 97 Cal. 507; *Schneider v. Brown*, 85 id. 205; *Mott v. Mott*, 82 id. 413.

<sup>163</sup> *Redington v. Cornwell*, 90 Cal. 49; *Collins v. Scott*, 100 id. 446; *Dougall v. Schulenberg*, 101 id. 154; *Easton v. O'Reilly*, 63 id. 305.

<sup>164</sup> *White v. Soto*, 82 Cal. 654.

<sup>165</sup> *Heilbron v. Heinlen*, 72 Cal. 376; and see *Swift v. Mulkey*, 14 Oreg. 59; § 4450, *ante*.

<sup>166</sup> *Reinhart v. Lugo*, 86 Cal. 395. Amendment of complaint in mortgage foreclosure. See *Bank of Sonoma County v. Charles*, 86 Cal. 322. Amendment by change in allegation of partnership. *Bogart v. Crosby*, 91 Cal. 278. Amendment of allegations of creditors' bill. *Perea v. De Gallegos*, 3 N. Mex. 151. Amendment of complaint in action by assignee of promissory note. *Brisbois v. Lewis*, 9 Col. 494.

in an action, an objection upon appeal from a judgment therein that the original complaint failed to state a cause of action is untenable.<sup>167</sup>

**§ 4450e. The same — time to answer.** Where the complaint is amended upon the trial, by the addition of a few lines, to obviate an objection to the admission of evidence upon a point which the pleader had evidently intended to make by the original complaint, it is not an abuse of discretion to require the defendant to answer the amendment immediately, if the answer could be easily made at once without inconvenience to the defendant.<sup>168</sup>

**§ 4450f. Amendment of answer.** Liberality in allowing amendments to pleadings is particularly applicable to amendments to an answer.<sup>169</sup> But it is not an abuse of discretion for the trial court to refuse to allow an amended answer to be filed, when the matters set out therein are not substantially different from those already pleaded in the answer on file.<sup>170</sup> It is not an abuse of discretion to permit an answer to be amended after the jury is impaneled, where it does not appear that the plaintiff was taken by surprise, or suffered any injury therefrom;<sup>171</sup> or to allow an answer to be amended at the trial after the introduction of testimony, where the same is allowed upon terms and no objection is made that it was without notice.<sup>172</sup> Amendments to the answer, to enable the defendant to prove facts which will constitute a defense to the plaintiff's demand, should be allowed, and if by reason of such amendments the court is satisfied that the plaintiff is taken by surprise, and requires further time to meet the defense, it can continue the case, and impose such terms as will compensate the plaintiff for the expense and delay caused thereby.<sup>173</sup> It

<sup>167</sup> *Hunter v. Bryant*, 98 Cal. 247.

<sup>168</sup> *Ellen v. Lewison*, 88 Cal. 253.

<sup>169</sup> *Gould v. Stafford*, 101 Cal. 32; see § 4448, *ante*.

<sup>170</sup> *Heilbron v. Canal Co.*, 76 Cal. 11; *Duff v. Duff*, 101 id. 1; see *Dorn v. Baker*, 96 id. 206.

<sup>171</sup> *Beronio v. Railroad Co.*, 86 Cal. 415; and see *Jorgenson v. Commercial Co.*, 13 Mont. 288.

<sup>172</sup> *Publishing Co. v. Brewing Co.*, 10 Utah, 147.

<sup>173</sup> *Guiderly v. Green*, 95 Cal. 630; see *Culverhouse v. Crosan*, 94 id. 544; *Skagit, etc., Lumber Co. v. Cole*, 2 Wash. St. 57; *Storch v. McCain*, 85 Cal. 304.

is within the discretion of the trial court to allow the filing of an amended answer upon the merits by the defendant, after a finding against him upon his answer setting up the pendency of another suit between the parties in relation to the same subject-matter.<sup>174</sup> A defendant may amend an answer which has been demurred to before trial of the issue of law, as of course and without entry of an order permitting it, provided he serves the opposite party with notice and copy of the amendment, as required by the Colorado statute.<sup>175</sup> Refusal of leave to file an amended answer is not error, when the motion therefor is made on the eve of the trial, and the jury is in attendance, and especially when the case is afterwards tried as if all the matters set forth in the amended answer were pleaded.<sup>176</sup> And the erroneous refusal to allow an amendment to the answer becomes immaterial if the defendant was allowed to introduce all the evidence which he could have introduced under the proposed amendment, and such evidence shows no defense.<sup>177</sup> Refusal to allow the defendant to amend his answer after the plaintiff's testimony has been introduced, is not an abuse of the court's discretion.<sup>178</sup> And refusal to allow a defendant to file an amended answer setting up matters which could be proved under the averments of the original answer is not erroneous.<sup>179</sup> When a new answer is filed the former answer is in effect withdrawn, and ceases to be a part of the record, and all motions and demurrers relating thereto accompany it.<sup>180</sup>

**§ 4450g. Amendment of demurrer.** A defendant, after filing a demurrer to the complaint, and before the trial of the issues

<sup>174</sup> *State v. Superior Court*, 9 Wash. St. 366. Amending answer by setting up the pendency of another action involving the same cause of action. See *Courbrough v. Adams*, 70 Cal. 374. Amendment allowing the introduction of written evidence by the defendant. *Hart v. Insurance Co.*, 80 Cal. 440.

<sup>175</sup> *McDonald v. Halley*, 1 Col. App. 303. Further amendment of answer during second trial. *McPherson v. Weston*, 85 Cal. 90.

<sup>176</sup> *Shadburne v. Daly*, 76 Cal. 355.

<sup>177</sup> *Railroad Co. v. Purcell*, 77 Cal. 69; see, also, *Peck v. Rees*, 7 Utah, 467.

<sup>178</sup> *Price v. Scott*, 13 Wash. St. 574.

<sup>179</sup> *Edgar v. Stevenson*, 70 Cal. 286; see *Wixon v. Devine*, 91 Id. 477. Amendment of answer upon trial in an action for a dissolution and accounting of an alleged partnership. See *Guidery v. Green*, 95 Cal. 630.

<sup>180</sup> *Wells v. Applegate*, 12 Oreg. 208; *Hexter v. Schneider*, 14 Id. 184.

of law thereon, has a right as of course to file an amended demurrer.<sup>181</sup>

**§ 4450h. Amendment — relief against mistake.** The discretionary power of the court conferred by the statute (Cal. Code. Civ. Pro., § 473), extends to relief against a mistake in any respect, whether the obstruction to the disposition of cases upon their substantial merits be a mistake of fact, or a mistake as to the law. The fact that the proposed amendment is based mainly upon a mistake of law is immaterial, though it may be that the court should require a stronger showing to justify relief from the effect of a mistake in law than in case of a mistake as to matter of fact.<sup>182</sup>

**§ 4450i. Amendment of affidavits.** Amendments of defects in affidavits are liberally allowed in most of the states.<sup>183</sup> Under the California statute (Code Civ. Pro., § 473), the trial court has power, in the exercise of its discretion, to allow an insufficient affidavit of merits, which has been filed in due time upon a motion to change the place of trial, to be amended after the time for filing the original affidavit has expired, and the filing of the amended affidavit relates back to the time of the filing of the original affidavit.<sup>184</sup>

**§ 4450j. Amendment on appeal from Justice's Court.** Under Oregon practice (Hill's Code, §§ 581, 2130), the Circuit Court can try nothing but the issues made up in the Justice's Court, and has no authority on appeal to allow any change to be made in the issues, as by filing an answer.<sup>185</sup>

**§ 4451. Practice on Amendments.** An amended complaint may be filed without prejudice to an injunction issued on the original complaint.<sup>186</sup> If the complaint is amended, a copy of the amendments must be filed, or the court may in its discretion require the complaint as amended to be filed, and a

<sup>181</sup> Cal. Code Civ. Pro., § 472; *Hedges v. Dam*, 72 Cal. 520; and see § 4447, *ante*.

<sup>182</sup> *Ward v. Clay*, 82 Cal. 502; *Gould v. Stafford*, 101 id. 32.

<sup>183</sup> See *Avery v. Good*, 114 Mo. 290; *Reese v. Walker*, 89 Ga. 72; *Green v. Boon*, 57 Miss. 617; *Stone v. Miller*, 60 Iowa. 243; *Re Cussick's Appeal*, 136 Penn. St. 459; *McKichan v. Follett*, 87 Ill. 103.

<sup>184</sup> *Palmer v. Barclay*, 92 Cal. 199; and see *Burnham v. Hays*, 3 id. 115; 58 Am. Dec. 389.

<sup>185</sup> *Forbis v. Inman*, 23 Oreg. 68; *Currie v. So. Pac. Co.*, 21 id. 566.

<sup>186</sup> *Barber v. Reynolds*, 33 Cal. 497.

copy of the amendments to be served upon the defendants affected thereby. The defendant must answer in such time as may be ordered by the court, and judgment by default may be entered upon failure to answer as in other cases.<sup>187</sup> If the time for answer is not fixed, then the defendant should answer within the same time required in case of service of the original complaint.<sup>188</sup> When a demurrer to a pleading is sustained, the adverse party shall have ten days from service of notice of the entry of the order in which to amend the pleading demurred to, and to file and serve such amended pleading. The party whose demurrer has been sustained shall have ten days from such service in which to answer or demur to such amended pleading. The court may impose such terms as it may deem proper on granting leave to file such amended pleadings.<sup>189</sup> In cases where the right to amend any pleading is not of course, the party desiring to amend, together with the notice of application to amend, shall serve an engrossed copy of the pleading, with the amendment incorporated therein, or a copy of the proposed amendment, referring to the page and line of the pleading where the amendment is to be inserted; and if the pleadings were verified, shall verify such amended pleading, or such proposed amendment, before the application shall be heard. No pleading shall be amended by verifying the same when the original was not verified. So when defendant is allowed time to answer until plaintiff elects upon which count of the complaint he will go to trial, the plaintiff should serve a copy of complaint with the notice of his election.<sup>190</sup> In New

<sup>187</sup> Cal. Code Civ. Pro., § 432. The provision of this section of the Code requiring an amended complaint to be served on the defendants affected thereby, has reference to amendments made after the parties have been brought into court, and does not require a mode of service of summons differing from other cases. *Dowling v. Comerford*, 99 Cal. 204. An objection that an amended complaint was served on the defendants personally, and not on their attorneys, must be taken in the lower court by motion, and, in the absence of such motion, the appellate court will not reverse a judgment against the defendants for such merely technical error. 93 Cal. 653.

<sup>188</sup> *People v. Rains*, 23 Cal. 128.

<sup>189</sup> See Cal. Code Civ. Pro., § 476; *Forni v. Yoell*, 99 Cal. 176; *Elder v. Spinks*, 53 id. 293; *McGary v. Bedrorena*, 58 id. 91; *Schuttler v. King*, 12 Mont. 149; § 4447, *ante*. It is within the discretion of the court to limit to only twenty-four hours the time in which to file an amended complaint. *Schultz v. McLean*, 109 Cal. 437.

<sup>190</sup> *Willson v. Cleaveland*, 30 Cal. 192.

York the defendant in an action has the right to serve an amended answer within twenty days after the service of the original, and to include therein a new defense; and this without regard to the nature of the defense.<sup>191</sup> Under the Code it is the practice where a party amends his pleadings, either of course or after obtaining consent or leave, to serve a new pleading; and it supersedes the original. It is the practice, too, to designate it on its face as an amended complaint or answer, as the case may be; though it has been held that the omission to designate it does not render it void.<sup>192</sup> Where amendments are made without authority, a motion to strike them out can be made at any time.<sup>193</sup> As a general rule, a party can not judge for himself of the sufficiency of a pleading, or of the materiality of an amendment, but must bring the question before the court.<sup>194</sup> But when an amended pleading, in which the amendments are clearly frivolous or immaterial, is served immediately before the circuit, and obviously for the mere purpose of delay, it may be disregarded.<sup>195</sup> Where the court has allowed the plaintiff, after the defendant has filed a plea in abatement, to amend his writ and declaration to meet the case presented by the plea, the defendant who has appeared for the purpose of pleading in abatement only is thereby put out of court; and a judgment by default may be rendered against him if he fail to appear again and plead to the action.<sup>196</sup>

§ 4451a. **The same — continued.** To authorize the allowance of any amendment, except one which is merely formal, there should be an affidavit showing good cause.<sup>197</sup> Without a showing of good cause by affidavit, the allowance of an amendment of a demurrer to a complaint by which the Statute of Limitations is interposed as a bar to the action, is erroneous.<sup>198</sup> So where the defendant desires to amend a verified answer by contradicting certain portions thereof, he should by his affidavit in support of the motion explain why he swore to the statements

<sup>191</sup> *McQueen v. Babcock*, 3 Keyes, 428.

<sup>192</sup> *Hurley v. Second Building Association*, 15 Abb. Pr. 206, note.

<sup>193</sup> *Church v. Syracuse Co.*, 32 Conn. 372.

<sup>194</sup> *Vanderbilt v. Bleeker*, 4 Abb. Pr. 289.

<sup>195</sup> *Id.*

<sup>196</sup> *Randolph v. Barrett*, 16 Pet. 138.

<sup>197</sup> *Garrison v. Goodale*, 23 Oreg. 307; *People v. Barton*, 4 Col. App. 455; *Canfield v. Bates*, 13 Cal. 606; see *Wabash, etc., R. R. Co. v. Morgan*, 132 Ind. 430; *Caldwell v. Meshew*, 53 Ark. 263.

<sup>198</sup> *People v. Barton* 4 Col. App. 455.



in the original answer if they were not true.<sup>199</sup> Where a party desires to amend his pleadings by withdrawing a damaging admission, the application for leave to do so should be made the instant the error is discovered, and a broad, substantial showing of mistake is essential to entitle him to relief in the premises.<sup>200</sup> The court may affix conditions to whatever order it makes in response to an application to amend, and, unless its discretion in this particular has been abused, error can not be predicated on its action.<sup>201</sup> Adequate terms should be enforced, not merely as a matter of justice to the parties, but to the end that there may be more diligence in the preparation of causes, and the public business be thereby expedited.<sup>202</sup> As a general rule in ordinary cases, the party amending his pleading will be required to pay all taxable costs up to the time of amending, and also costs for opposing the motion.<sup>203</sup>

**§ 4451b. Right to answer amended pleadings.** The right to answer an amended pleading is one of which a party can not be deprived even after entry of default against him on the original pleading. The amendment of a pleading in matter of substance opens the default on the original pleading, and the amended pleading must be served upon a defaulting defendant.<sup>204</sup>

**§ 4452. Notice of motion for leave to amend.**

*Form No. 1085.*

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit herewith served, and on all the papers on file in this action, the undersigned will move the court, at the courtroom thereof, at ..... on the ..... day of ....., 18.., at ..... o'clock, in the ..... noon, or as soon thereafter as counsel can be heard, for leave to amend his complaint herein, by the insertion of the following clause, to-wit [here insert proposed

<sup>199</sup> *Barton v. Laws*, 4 Col. App. 212.

<sup>200</sup> *Buno v. Gomer*, 3 Col. App. 456.

<sup>201</sup> *Miller v. Thorpe*, 4 Col. App. 559; and see *McHenry v. Grant*, 84 Wis. 311; *Bausch v. Ingersoll*, 61 Hun, 627; 16 N. Y. Supp. 336; *Culverhouse v. Crosan*, 94 Cal. 544; *Burns v. Scaoffy*, 98 id. 271; *Stallings v. Barrett*, 26 S. C. 474.

<sup>202</sup> *Saint v. Guerrerio*, 17 Col. 448.

<sup>203</sup> *Smith v. Dragert*, 65 Wis. 507; *Coleman v. Davis*, 13 Col. 98.

<sup>204</sup> *Reinhart v. Lugo*, 86 Cal. 395.



amendment], after the word “.....,” on line ....., of page ..... thereof, and for such other and further relief as may be just.

[DATE.]

[SIGNATURES.]

**§ 4453. Order giving leave to amend.**

*Form No. 1086.*

[TITLE.]

On reading and filing the affidavit of A. B., and the notice of this motion, and the proof of due service thereof, and on motion of E. F., attorney for plaintiff, and after hearing G. H., attorney for defendant:

It is hereby ordered that the plaintiff have leave to amend his complaint, on file in this action, by inserting the following, to-wit [here insert amendment], after the word “.....,” on line ....., of page ..... thereof.

[DATE.]

[SIGNATURE.]

**§ 4454. Statement in order.** An order granting leave to amend generally, without specifying in what particular, is improvident.<sup>205</sup>

**§ 4455. Notice of motion to strike out irrelevant or redundant matter.**

*Form No. 1087.*

[TITLE.]

[ADDRESS.]

Please take notice that on [the affidavit herewith served, and] the pleadings on file in this action, the undersigned will move the court, at the courtroom thereof, at ....., on the ..... day of ....., 18.., at ..... o'clock in the ..... noon, or as soon thereafter as counsel can be heard, to strike out matter contained in the complaint [or answer] herein, from and after the word “.....,” on line ....., of page ....., down to and including the word “.....,” on line ....., of page ....., as irrelevant [or redundant], and for such other relief as may be just, with costs.

[DATE.]

[SIGNATURE.]

**§ 4456. Statement in motion.** Motion to strike out must specifically point out the objectionable matter.<sup>206</sup> Motion to

<sup>205</sup> Thompson v. Malone. 13 Rich. L. 252.

<sup>206</sup> People v. Empire G. & S. M. Co., 33 Cal. 171.

strike out immaterial portions of the pleadings are not parts of the judgment-roll. They are no part of a record on appeal unless made so by a statement.<sup>207</sup>

**§ 4457. Order to strike out irrelevant or redundant matter.**

*Form No. 1088.*

[TITLE.]

On reading and filing [designate motion papers], and on motion of G. H., for the defendant, and after hearing E. F., attorney for plaintiff, in opposition thereto:

It is ordered that the matter contained in the complaint [or answer] in this action, from the word “.....,” on line ....., of page ....., down to and including the word “.....,” on line ....., of page ....., be stricken out as redundant [or irrelevant].

[DATE.]

[SIGNATURE.]

As a matter of good practice, an order to strike out should specify particularly and correctly the matter to be stricken from the pleading.<sup>208</sup>

**§ 4458. Irrelevant pleading defined.** A pleading is irrelevant which has no substantial relation to the controversy between the parties to the action.<sup>209</sup> It includes prolixity or needless details of material matter.<sup>210</sup> Matter contained in an amended complaint is not irrelevant or redundant to a cause of action set out in the original complaint in the same action.<sup>211</sup>

**§ 4459. What may be stricken out.** Sham and irrelevant answers, and irrelevant and redundant matter, inserted in a pleading, may be stricken out on such terms as the court may in its discretion impose.<sup>212</sup> Redundant or irrelevant pleadings may be objected to by motion, but not by demurrer.<sup>213</sup> A

<sup>207</sup> *Sutter v. San Francisco*, 36 Cal. 112.

<sup>208</sup> *Mullen v. Wine*, 9 Col. 167.

<sup>209</sup> *Seward v. Miller*, 6 How. Pr. 313.

<sup>210</sup> *Lee Bank v. Kitching*, 11 Abb. Pr. 435; *Russ v. Brooks*, 4 E. D. Smith, 642; see § 191, *ante*. An amendment changing the nature of the action can not be objected to by way of answer setting up such change as a defense, and such answer may be stricken out as irrelevant. *Wheeler v. West*, 78 Cal. 95.

<sup>211</sup> *Nevada County, etc., Canal Co. v. Kidd*, 28 Cal. 673; see § 191 *et seq.*

<sup>212</sup> Cal. Code Civ. Pro., § 453.

<sup>213</sup> *Kinyon v. Palmer*, 18 Iowa, 377. An answer which is evasive, frivolous, and largely made up of legal conclusions, may, be

motion by the defendant to strike out certain portions of the plaintiff's complaint as irrelevant and redundant was granted, with leave also to the plaintiff "to amend his summons and complaint as he should be advised." The plaintiff thereupon amended his summons in pursuance of such leave, and at the same time gave notice of his election not to amend his complaint under the leave given. The defendant thereupon answered the complaint; and within twenty days after receiving such answer, the plaintiff served an amended complaint; it was held that the plaintiff was entitled to amend the complaint again, of course, after defendant had thus answered.<sup>214</sup> It seems that the right to move to strike out an answer for irrelevancy, and the right to demur to an answer for insufficiency, were not designed for the same purpose; and it is not optional with the plaintiff whether he will resort to a demurrer or to a motion to test the sufficiency of the answer.<sup>215</sup> If irrelevancy is not palpable, it should not be stricken out, but demurrer will lie.<sup>216</sup> Irrelevant matter in a complaint may be stricken out on motion;<sup>217</sup> or immaterial matter;<sup>218</sup> or averments of deraignments of title;<sup>219</sup> or superfluous matter, when inserted by itself,<sup>220</sup> such as the name of plaintiff's wife.<sup>221</sup> And in general every fact not essential to a claim or defense.<sup>222</sup> If a copy of a written contract sued on be attached to the complaint, and the averments of the complaint put a false construction of law upon the terms of the contract, such averments may be regarded as surplusage.<sup>223</sup> Allegations in the complaint which are absurd or impossible may be stricken out.<sup>224</sup> Where

properly stricken from the files on motion. *Crane v. Andrews*, 10 Cal. 265; and see *Isaacs v. Holland*, 4 Wash. St. 54.

<sup>214</sup> *Ross v. Dinsmore*, 12 Abb. Pr. 4.

<sup>215</sup> *Littlejohn v. Greeley*, 13 Abb. Pr. 311.

<sup>216</sup> *Id.*; *Struver v. Ocean Ins. Co.*, 9 Abb. Pr. 23; *Waddell v. Cook*, 2 Hill. 47; *Littlejohn v. Greeley*, 22 How. Pr. 345; see, however, *Lee Bank v. Kitching*, 11 Abb. Pr. 439. See, as to notice, *Balley v. Lane*, 13 *id.* 354; as to pendency of motion, *Kellogg v. Baker*, 15 *id.* 286.

<sup>217</sup> *Green v. Palmer*, 15 Cal. 411; *Bowen v. Aubrey*, 22 *id.* 566.

<sup>218</sup> *Larco v. Casaneuava*, 30 Cal. 560.

<sup>219</sup> *Id.*; *Willson v. Cleaveland*, 30 Cal. 192.

<sup>220</sup> *Boles v. Cohen*, 15 Cal. 150.

<sup>221</sup> *Warner v. Steamship Uncle Sam*, 9 Cal. 697.

<sup>222</sup> *Green v. Palmer*, *supra*.

<sup>223</sup> *Stoddard v. Treadwell*, 26 Cal. 294.

<sup>224</sup> *Sacramento Co. v. Bird*, 31 Cal. 66; see further, § 191 *et seq.*

the facts stated in the complaint constitute a sufficient cause of action, other unnecessary matter may be stricken out, and demurrer will not lie. But an entire pleading can not be stricken out as irrelevant or redundant.<sup>225</sup>

**§ 4460. Notice of motion to require plaintiff to elect between several counts of complaint, in certain cases.**

*Form No. 1089.*

[TITLE.]

[ADDRESS.]

Please take notice that upon the pleadings on file in this action, and on an affidavit, of which a copy is herewith served, the undersigned will move the court, at the courtroom thereof, at . . . . ., on the . . . . . day of . . . . ., 18.., at . . . . . o'clock in the . . . . . noon, or as soon thereafter as counsel can be heard, that the plaintiff be compelled to elect between the cause of action stated in the first count and the cause of action stated in the second count in the complaint, and state which he will rely on; and that on such election the other be stricken out; or in default of so electing, then that the second stated cause of action be stricken out as redundant; and for such other or further relief as may be just, and for the costs of this motion.

[DATE.]

[SIGNATURE.]

**§ 4461. Practice.** When the defendant is allowed time to answer until the plaintiff elects on which count of the complaint he will go to trial, the plaintiff should serve a copy of the complaint, with the notice of his election.<sup>226</sup>

<sup>225</sup> *Benedict v. Dake*, 6 How. Pr. 352; but see Cal. Code Civ. Pro., § 453. To strike out a pleading which is susceptible of being amended by a statement of facts known to exist, and which constitute a cause of action or defense, is a harsh proceeding, and should only be resorted to in extreme cases. *Burns v. Scooffy*, 98 Cal. 271; and see *Hatch v. Railroad Co.*, 6 Wash. St. 1; *Walter v. Fowler*, 85 N. Y. 621. Where the answer contains several defenses, some of which are verified and others not, it is not error to strike out the unverified portion of the answer, with leave to defendants to further answer as to such portion if they should so desire. *Nichols v. Jones*, 14 Col. 61.

<sup>226</sup> *Willson v. Cleaveland*, 30 Cal. 192; see § 4460, *ante*.

**§ 4462. Affidavit on motion to compel plaintiff to elect between several counts of complaint.**

*Form No. 1090.*

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. I am the defendant in the above-entitled action [or show in some way deponent's knowledge of the facts].

II. That only one transaction of the nature mentioned in either of the alleged causes of action set forth in the complaint ever occurred between deponent and the plaintiff, and that the transactions mentioned in both of the said alleged causes of action are in fact one and the same.

[JURAT.]

[SIGNATURE.]

**§ 4463. Notice of motion to strike out sham answer.**

*Form No. 1091.*

[TITLE.]

[ADDRESS.]

Take notice that on the affidavit herewith served, and on the pleadings on file in this action, the undersigned will move the court, at the court-room thereof, at . . . . ., on the . . . . . day of . . . . ., 18.., at . . . . . o'clock in the . . . . . noon, or as soon thereafter as counsel can be heard, to strike out the second defense in the answer herein as sham, and the third defense as irrelevant; or for such other relief as may be just, with costs.

[DATE.]

[SIGNATURE.]

**§ 4464. Statement in motion.** A plaintiff may, on one motion, ask: 1. To strike out defenses as sham and irrelevant; 2. For judgment on a demurrer as frivolous; 3. To strike out irrelevant and redundant matter; 4. To have the allegations made definite and certain.<sup>227</sup> The proper mode of taking advantage of defect in an answer which improperly blends and defectively states matters set forth therein, is by motion to strike out either the whole of it, or such parts as are defectively pleaded.<sup>228</sup>

<sup>227</sup> People v. McCumber, 15 How. Pr. 186; S. C., 18 N. Y. 315; 72 Am. Dec. 515.

<sup>228</sup> Kinney v. Miller, 25 Mo. 576.

**§ 4465. Notice of motion to strike out irrelevant answer.***Form No. 1092.*

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit, a copy of which is herewith served, and the pleadings on file in this action, the undersigned will move the court, at the courtroom thereof, at ....., on the ..... day of ....., 18.., at the hour of ..... o'clock in the ..... noon, or as soon thereafter as counsel can be heard, to strike out the answer herein as irrelevant; or for such other relief as may be just, with costs.

[DATE.]

[SIGNATURE.]

**§ 4466. Ambiguous answer.** If an answer is ambiguous, and does not sufficiently disclose the particulars of a transaction relied on as a defense, the plaintiff's remedy is by motion, under section 546 of the Code of Civil Procedure of New York, to make the answer more definite and certain. He can not accept the plea and go to trial upon it, and then interpose the objection for the first time that it is not sufficiently descriptive of the particulars relied on.<sup>229</sup> In California, under subdivision 3 of section 444 of the Code of Civil Procedure, demurrer would lie in such a case.

**§ 4467. Answer with denials only.** Although a general denial to the allegations of the complaint may, if falsely pleaded, be characterized as sham, yet an inquiry in advance of the trial can not be entertained by the court as to the good faith of the defendant in pleading it, nor can it be stricken out as sham on the application of the plaintiff.<sup>230</sup> A verified answer of denial should not be stricken out as sham, even after the defendant, on examination before trial, has admitted what the answer denies.<sup>231</sup> Where the plaintiff claims that all the denials are bad, if the answer contains no new matter, he may test the sufficiency of the denials by a motion for judgment upon the pleadings, or by motion to strike out the answer on the ground

<sup>229</sup> *Farmers & Citizens' Bank v. Sherman*, 33 N. Y. 80.

<sup>230</sup> *Fay v. Cobb*, 51 Cal. 313; see, also, *Amador Co. v. Butterfield*, id. 526; *Wayland v. Tysen*, 45 N. Y. 281; reversing 9 Abb. Pr. (N. S.) 79; *Claffin v. Jaroslowski*, 64 Barb. 463; *Strong v. Sproul*, 53 N. Y. 497; reversing S. C., 4 Daly, 326.

<sup>231</sup> *Schultze v. Rodewald*, 1 Abb. N. C. 365.

that it is sham. If some of the denials are deemed good and the others bad, he may move to strike out the latter. Answers consisting of denials which do not explicitly traverse the material allegations of the complaint we hold so far sham and irrelevant, within the meaning of the statute.<sup>232</sup>

§ 4468. **Discretion of court.** An answer filed without leave, after time for answering has expired, but before default has been entered, is not a nullity, but at most an irregularity, and the court in its discretion may strike it out or retain it.<sup>233</sup> The motion to strike out answers, because denying on information and belief, and for judgment on the complaint, is held to be properly overruled.<sup>234</sup>

§ 4469. **Informal answers.** If the answer has the signature of the attorney of record, and that of an associate attorney, attached to it, the court will not strike it out. The court will not try the question whether the signature of the attorney of record was put there by himself or by his associate without his authority.<sup>235</sup> If an answer tends to constitute a defense, it is not irrelevant, however informal or inartificial.<sup>236</sup>

§ 4470. **Proceedings on motion to strike out.** When plaintiff moves on affidavit to strike out a defense as "sham," the affidavit of defendant that his defense is *bona fide* will defeat the motion.<sup>237</sup> When, to resist a motion to strike out as sham a defense good on its face, admissions on the part of the plaintiff are positively sworn to, which are neither contradicted, qualified, nor questioned, and which tend to sustain the defense, the motion should be denied.<sup>238</sup> On motion to strike out as sham an answer of joint defendants, where it appears that some of the defendants may have a valid defense, they may be permitted to

<sup>232</sup> Gay v. Winter, 34 Cal. 153.

<sup>233</sup> Bower v. Dickerson, 18 Cal. 420.

<sup>234</sup> Comerford v. Dupuy, 17 Cal. 308; Oregonian Ry. Co. v. Oregon R. & N. Co., 4 West Coast Rep. 548.

<sup>235</sup> Willson v. Cleaveland, 30 Cal. 192.

<sup>236</sup> Wallace v. Bear River Water & Mining Co., 18 Cal. 461; Gregory v. Wright, 11 Abb. Pr. 417; Dovan v. Dinsmore, 33 Barb. 86; De Forest v. Baker, 1 Abb. Pr. (N. S.) 34.

<sup>237</sup> Gostorfs v. Taaffe, 18 Cal. 385; Beebe v. Marvin, 17 Abb. Pr. 194; see Wedderspoon v. Rogers, 32 Cal. 569, where authorities are collected.

<sup>238</sup> Hadden v. New York Silk Manufacturing Co., 1 Daly, 388.

serve an amended answer, which would be denied to the other defendants who show no merits.<sup>239</sup>

**§ 4471. Sham answer defined.** A sham answer is one good in form, but false in fact, and not pleaded in good faith. It sets up new matter which is false.<sup>240</sup> A defense is a sham which is so clearly false as not to present any substantial issue.<sup>241</sup> To sustain the motion, falsity and bad faith should both be established;<sup>242</sup> as there is a distinction between a false answer and a frivolous answer.<sup>243</sup> A false answer, not verified, is a sham answer.<sup>244</sup> Sham pleading is the setting up of a defense which has not only no foundation in fact, but which, it is manifest, was interposed for vexation or delay.<sup>245</sup>

**§ 4472. Sham defense, how tested.** Where the plaintiff claims that all the denials are bad, if the answer contains no new matter, he may test the sufficiency of the denials by a motion for judgment upon the pleadings, or by motion to strike out the answer on the ground that it is a sham.<sup>246</sup> An answer

<sup>239</sup> *Burrall v. Bowen*, 21 How. Pr. 378. As to proceedings on motion to strike it out generally, see *Grogan v. Ruckle*, 1 Cal. 193; *Kellogg v. Baker*, 15 Abb. Pr. 286; *Speer v. Craig*, 16 Col. 478; *Nichols v. Jones*, 14 id. 61. On motion denied, *Seward v. Miller*, 6 How. Pr. 312; *Miln v. Vose*, 4 Sandf. 660. On motion granted, *Aymar v. Chase*, 1 Code R. (N. S.) 141; *Burrall v. Bowen*, 21 How. Pr. 378. On leave to file amended answer, *Mussini v. Stillman*, 13 Abb. Pr. 93.

<sup>240</sup> *Piercy v. Sabin*, 10 Cal. 22; 70 Am. Dec. 692; *Gostorfs v. Taafe*, 18 Cal. 385; *Leach v. Boynton*, 3 Abb. Pr. 1.

<sup>241</sup> *Brewster v. Hall*, 6 Cow. 34; *Oakley v. Devoe*, 12 Wend. 196; *People v. McCumber*, 18 N. Y. 315, 323; 72 Am. Dec. 515.

<sup>242</sup> *Hadden v. New York Silk Manufacturing Co.*, 1 Daly, 388; *Kellogg v. Baker*, 15 Abb. Pr. 286; *Lockwood v. Salhenger*, 18 id. 136.

<sup>243</sup> *Hecker v. Mitchell*, 5 Abb. Pr. 453; *Hull v. Smith*, 8 How. Pr. 150; *Davis v. Potter*, 4 id. 155. Falsity is the test of a sham answer. An answer taking issue only on an immaterial issue of the complaint is frivolous. *Goldstein v. Krause*, 2 Idaho, 271.

<sup>244</sup> *Brewster v. Hall*, 6 Cow. 34; *Slack v. Cotton*, 2 E. D. Smith, 398; *Oakley v. Devoe*, 12 Wend. 196; *Nichols v. Jones*, 6 How. Pr. 355; *Ostrom v. Bixby*, 9 id. 57; *Walker v. Hewitt*, 11 id. 398; *People v. McCumber*, 18 N. Y. 320; 72 Am. Dec. 515.

<sup>245</sup> *Hadden v. New York Silk Manufacturing Co.*, 1 Daly, 388.

<sup>246</sup> *Gay v. Winter*, 34 Cal. 152. Under the power to strike out the court can not determine the truth or falsity of a plea upon conflicting evidence. *Patrick v. McManus*, 14 Col. 65.



will not be adjudged to be sham simply upon an affidavit that it is false, for this would be trying the merits of the defense upon affidavits. But the court must be satisfied from an inspection of the pleading, or from circumstances brought to its knowledge, that the object of the pleader was to delay or annoy the plaintiff, or to trifle with the court.<sup>247</sup> To warrant striking out a pleading as frivolous, it must be clearly bad on inspection merely.<sup>248</sup> The right of a defendant to have the issues tried by a jury depends on the existence of a real issue, and the court has power to try, on motion, the question whether there is a substantial issue, or only a sham and fictitious one.<sup>249</sup>

**§ 4473. Sham answers may be stricken out.** Sham and irrelevant answers and defenses, and so much of any pleading as may be irrelevant, redundant, or immaterial, may be stricken out, upon motion, upon such terms as the court, in its discretion, may impose.<sup>250</sup> These provisions apply equally to mere denials of allegations of the complaint as to affirmative matter, and equally to verified as to unverified answers;<sup>251</sup> as the verification of an answer is no bar to the motion.<sup>252</sup>

**§ 4474. Unverified answers.** An answer unverified to a verified complaint may be stricken out on motion; for if the complaint is sworn to, a general denial in the answer admits all its material allegations.<sup>253</sup> And though the inability of counsel to obtain defendant's verification in time may be good ground for an extension of time to answer, yet it can not avail in resisting a motion to strike out, and for judgment after the answer is filed.<sup>254</sup> But it was held that the objection should have been raised in the court below, and been passed upon, and

<sup>247</sup> *Mayor, etc. v. Dias*, 1 East, 237; *Smith v. Oriell*, id. 369; *White v. Howard*, 3 Taunt. 339; *King, The, v. Woolf*, 1 Chit. 424, and note a; *Bones v. Bunter*, id. 564, and note a; 5 Barn. & Adol. 750, and note a; *Brewster v. Hall*, 6 Cow. 34; *Hadden v. New York Silk Manufacturing Co.*, 1 Daly, 388; *McDonald v. Pincus*, 13 Mont. 83.

<sup>248</sup> *Smith v. Mead*, 14 Abb. Pr. 262.

<sup>249</sup> *People v. McCumber*, 18 N. Y. 315, 323; 72 Am. Dec. 515.

<sup>250</sup> Cal. Code Civ. Pro., § 453; *Johnson v. Tabor*, 4 Col. App. 183. A counterclaim, if sham, may be stricken out upon motion. *Patrick v. McManus*, 14 Col. 65.

<sup>251</sup> *People v. McCumber*, 18 N. Y. 315, 323; 72 Am. Dec. 515.

<sup>252</sup> *Lawrence v. Derby*, 24 How. Pr. 133; S. C., 15 Abb. Pr. 346. This principle was questioned in *Gostorfs v. Taaffe*, 18 Cal. 385.

<sup>253</sup> *Pico v. Collmas*, 32 Cal. 578.

<sup>254</sup> *Drum v. Whiting*, 9 Cal. 422.

that plaintiff having rested his cause at the trial, on the ground of want of an affidavit, he will not be permitted to say here for the first time that the answer does not in a proper form controvert the allegations of the complaint.<sup>255</sup> To a complaint against three persons, upon a promissory note executed under a firm name, one of the defendants answered, denying his liability, and that he was one of the firm by whom the note was executed. Neither of the pleadings were verified. When the cause came on for trial, plaintiff moved to strike out defendant's answer for want of verification, and pending the motion, defendant asked leave to then verify the answer. The court denied defendant's motion, and struck out the answer; it was held that the refusal by the court to allow the verification was such an abuse of discretion as to amount to error.<sup>256</sup> By verification of the complaint, the plaintiff can prevent the defendant from interposing a general denial in suits on promissory notes or bills of exchange by requiring a sworn answer.<sup>257</sup>

§ 4475. **What may be stricken out of answer.** A denial of a legal conclusion.<sup>258</sup> The denial of immaterial averments of the complaint. So a denial on want of any knowledge or information sufficient to form a belief, of matter presumptively within the knowledge of the defendant.<sup>259</sup> A defense of a verbal agreement, contemporaneous with making of note, to renew it at maturity.<sup>260</sup> An objection which ought to have been taken by demurrer, but is taken only by allegation in the answer, should be stricken out.<sup>261</sup> The objection that the allegations of an answer are hypothetical is not available on demurrer,<sup>262</sup> but on

<sup>255</sup> *Grogan v. Ruckle*, 1 Cal. 193.

<sup>256</sup> *Lattimer v. Ryan*, 20 Cal. 628; see further, § 3179.

<sup>257</sup> *Brooks v. Chilton*, 6 Cal. 640.

<sup>258</sup> *Wedderspoon v. Rogers*, 32 Cal. 569; *Seeley v. Engell*, 17 Barb. 530.

<sup>259</sup> *Lawrence v. Derby*, 15 Abb. Pr. 346, note; S. C., 24 How. Pr. 134; *Beebe v. Marvin*, 17 Abb. Pr. 194; *Sloane v. Railroad Co.*, 111 Cal. 668.

<sup>260</sup> *Bailey v. Lane*, 13 Abb. Pr. 359; S. C., 21 How. Pr. 475; *Shoe & Leather Bank v. Camp*, id. 443. What matters may be struck out of an answer as scandalous, immaterial, etc., see *Griswold v. Hill*, 1 Paine, 390; *Langdon v. Goddard*, 3 Story C. C. 13; *Thomas v. Berry*, 17 Col. 322.

<sup>261</sup> *Gassett v. Crocker*, 10 Abb. Pr. 133.

<sup>262</sup> *Nye v. Ayres*, 1 E. D. Smith, 553; *Wies v. Fanning*, 9 How. Pr. 543; *Taylor v. Richards*, 9 Bosw. 679.

motion to strike out. So the unessential parts of an answer may be stricken out;<sup>263</sup> or the denial only of what is nonessential in the complaint, for this is an admission of all that is essential to a recovery.<sup>264</sup> If inconsistent defenses be set up, the defect must be reached by motion to strike out, or in some cases by demurrer; and if no objection be taken to the answer on this ground, defendant on the trial may rely on any of his defenses, as under the old system.<sup>265</sup>

**§ 4476. When motion should be made.** An answer can not be stricken out after issue joined. If an answer is filed, raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the court takes the case into consideration, it can not then strike out the answer of the defendant and enter his default, and render judgment for plaintiff for the amount claimed in the complaint.<sup>266</sup> Where certain material averments

<sup>263</sup> *Green v. Palmer*, 15 Cal. 411; 76 Am. Dec. 492. The action of the trial court in striking an answer from the files and giving judgment on the pleadings, for the reason that the answer had been once ruled as demurrable and had been again filed after the sustaining of a demurrer to an amended answer, will not be disturbed, although such procedure may not be strictly regular. *Noyes v. Longhead*, 9 Wash. St. 325.

<sup>264</sup> *Leffingwell v. Griffing*, 31 Cal. 231.

<sup>265</sup> *Klink v. Cohen*, 13 Cal. 623; *Uridias v. Morrill* (No. 2), 25 Id. 35. An averment in an answer to a complaint on a bill of exchange, providing for the payment of attorney's fees in case of suit, that such fees were not due at the time the suit was filed, is properly stricken out as sham. *Bank of Commerce v. Fuqua*, 11 Mont. 285. One defendant can not answer for another who does not join in the answer, and an allegation in the answer of one defendant that a codefendant is working the mine in controversy as an employee may be stricken out as surplusage. *Wheeler v. West*, 78 Cal. 95. But it is error for the court to strike the defendant's answer from the files because of disobedience of a subpoena *duces tecum*, where the disobedience is by an illiterate person, without the advice of counsel, and where defendant's counsel before the making of the order, offer to admit everything that could be shown by the papers sought to be produced. *Frazer v. Lynch*, 88 Cal. 621. The correctness of an order striking out a part of an answer is to be tested by reference to the state of the pleadings at the time it was made. *De Baker v. Railway Co.*, 106 Cal. 257.

<sup>266</sup> *Abbott v. Douglass*, 28 Cal. 295; and see *Martin v. McLaughlin*, 91 Cal. 153. An answer having been filed under leave of court, it is not competent for another judge to order it stricken from the files because not filed in apt time. *Godding v. Live Stock Co.*, 4 Col. App. 15.

of the plaintiff's complaint were so defectively denied that, upon motion, such denials might properly have been stricken out as sham and irrelevant, yet without such objection made thereto, the plaintiff introduced proof at the trial in their support, it was held that by introducing said proof the plaintiff waived all objection to the sufficiency of said denials, and the court properly refused an instruction to the jury, asked by the plaintiff, to the effect that the facts so averred were admitted to be true for all the purposes of said trial.<sup>267</sup> Where party sets up matter in his answer not recognized by law as a defense to the action, it may be taken advantage of at any time.<sup>268</sup> If the defendant files his answer at the same time he does his demurrer, the court, after overruling the demurrer has no right to strike out an answer which raises a defense, because the defendant fails to pay the plaintiff twenty dollars, required by a rule of court to be paid for the privilege of answering when a demurrer is overruled.<sup>269</sup>

[TITLE.]

**§ 4477. Order striking out irrelevant answer.**

*Form No. 1093.*

[TITLE.]

On reading and filing [designate motion papers], and on motion of E. F., attorney for plaintiff, and after hearing G. H., attorney for defendant:

It is ordered that the answer of C. D., the defendant in this action, be stricken out as irrelevant, with . . . . . dollars costs to plaintiff.

[DATE.]

[SIGNATURE.]

**§ 4478. Order not appealable.** Orders striking out immaterial portions of pleadings are not appealable.<sup>270</sup>

<sup>267</sup> Tynan v. Walker, 35 Cal. 634; 95 Am. Dec. 152.

<sup>268</sup> Case v. Maxey, 6 Cal. 276; McDougall v. Maguire, 35 id. 274; 95 Am. Dec. 98.

<sup>269</sup> People v. McClellan, 31 Cal. 101. Amending an answer waives error in striking the original from the files. Gale v. James, 11 Cal. 540. But it was held that the filing of a substituted answer by the defendant did not operate as a waiver of his exception to an order striking out an affirmative defense in his original answer. Schulte v. Littlejohn, 2 Wash. St. 129.

<sup>270</sup> Sutter v. San Francisco, 36 Cal. 112; Briggs v. Bergen, 28 N. Y. 162; Beach v. Hodgdon, 66 Cal. 187.

**§ 4479. Notice of motion for leave to correct fictitious name.**  
*Form No. 1094.*

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit herewith served, and on all the pleadings and proceedings on file in this action, the undersigned will move this court, at the courtroom thereof, at ....., on the ..... day of ..... 18...., at ..... o'clock in the forenoon, or as soon thereafter as counsel can be heard, for leave to amend his complaint by substituting the name of ..... as the real name of the [defendant] in this action, wherever the name John Doe occurs in the papers filed in this action; or for such other relief as may be just.<sup>271</sup>

[DATE.]

[SIGNATURE.]

**§ 4480. Affidavit to obtain leave to correct fictitious name.**  
*Form No. 1095.*

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. I am the plaintiff in the above-entitled action:

II. I was not acquainted with the real name of the defendant therein until after the commencement of this action, and about ..... days ago.

III. That the defendant was sued in said action under the fictitious name of ....., and that his real name is .....

[JURAT.]

[SIGNATURE.]

**§ 4481. Mistakes in names, how corrected.** Mistakes in names of parties in a writ may be amended as a clerical misprision, even after the adjournment of the term, but the record itself must show the error.<sup>272</sup> But where there is a mistake in the Christian name of one of the plaintiffs throughout the proceedings, the court can not amend the judgment upon evidence *aliunde*.<sup>273</sup> A declaration in the name of a firm may be amended

<sup>271</sup> As a general rule, this is done by the suggestion of the true name, and its substitution in the place of the fictitious one.

<sup>272</sup> *Hegeler v. Henckell*, 27 Cal. 491; *Furniss v. Ellis*, 1 Brock. Marsh. 15; *Elliott v. Holmes*, 1 McLean, 466; *Gillett v. Robbins*, 12 Wis. 319.

<sup>273</sup> *Albers v. Whitney*, 1 Story C. C. 310; *Jackson v. Warren*, 32 Ill. 331; *Johnson v. Adelman*, 35 id. 265; but see *Henckler v. County Court*, 27 id. 39.

by inserting the names of the members of the firm.<sup>274</sup> A corporate name may be substituted for an individual name.<sup>275</sup> A formal variance, in suing a defendant by a wrong name, is amendable at any time.<sup>276</sup> On a plea of misnomer, the court may allow the plaintiff to amend the writ and declaration.<sup>277</sup> Leave to amend the writ by changing the name of one of the plaintiffs may be refused.<sup>278</sup>

**§ 4482. Order giving leave to correct fictitious name.**

*Form No. 1096.*

[TITLE.]

On reading and filing the affidavit of A. B., and the notice of this motion, with proof of due service thereof, and on motion of E. F., attorney for plaintiff, and after hearing G. H., attorney for defendant:

It is ordered that the name of ..... be substituted in the place of ....., as the real name of the defendant in this cause.

[DATE.]

[SIGNATURE.]

<sup>274</sup> *Tibbs v. Parrott*, 1 Cranch C. C. 177.

<sup>275</sup> *Jackson v. Warren*, 32 Ill. 331. Leave was granted to correct the corporate name of the plaintiff. *Corporation of Georgetown v. Beatty*, 1 Cranch C. C. 234; see Cal. Code Civ. Pro., § 473.

<sup>276</sup> *Scull v. Briddle*, 2 Wash. O. C. 200; *Craig v. Brown*, Pet. O. C. 139; *Shinn v. Cummins*, 55 Cal. 516; *McDonald v. Sweet*, 76 id. 257.

<sup>277</sup> *Randolph v. Barrett*, 16 Pet. 141; *Nelson v. Barker*, 3 McLean, 379.

<sup>278</sup> *Comegyss v. Robb*, 2 Cranch C. C. 141. A complaint may, in furtherance of justice and on such terms as may be proper, be amended by adding the name of a party plaintiff. *Rawles v. People*, etc., 2 Col. App. 501. And although an objection for misnomer of the plaintiff is waived by filing an answer to the merits, it is not prejudicial error for the court to order the filing of an amended complaint, after issue joined, where the complaint is amended without any considerable delay or expense. *Lee v. Lee*, 3 Wash. St. 236. Where a general leave to amend has been obtained, the plaintiff has a right to join other proper parties as defendants without special permission so to do. *Louvall v. Gridley*, 70 Cal. 507; and see *Stewart v. Spaulding*, 72 id. 264. If a defendant sued under a wrong name discloses his true name in his answer, he can not object to the court's giving leave, after the evidence is in, to amend the complaint accordingly. *Ramsey v. Cortland Cattle Co.*, 6 Mont. 498. Where the plaintiff sued three persons as partners, and on the trial, by leave of court, amended his complaint by striking out the name of one of them, and dismissed as to him, it was held that the other defendants were not prejudiced by the amendment. *Brown v. Pickard*, 4 Utah, 292.

**§ 4483. Notice of motion to amend complaint by adding defendant.**

*Form No. 1097.*

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit herewith served, and on all the proceedings on file in this action, the undersigned will move the court, at the courtroom thereof, at ..... on the ..... day of ....., 18.., at ..... o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the plaintiff may have leave to amend his summons and complaint in this action, by adding L. M. as a defendant therein, with proper words to charge him, and for such other and further relief as may be just.

[DATE.]

[SIGNATURE.]

**§ 4484. Order of court granting leave to amend.**

*Form No. 1098.*

[TITLE.]

On motion of E. F., attorney for plaintiff in this action, notice thereof being duly served on the defendant's counsel, and after hearing thereon, it is hereby ordered that plaintiff have leave to amend his complaint filed herein.

**§ 4485. The same — by striking out and making new parties.**

*Form No. 1099.*

I. [Insert as in previous form.]

II. By striking out E. B. and E. D. from being plaintiffs, and by making them defendants in said action; or by adding E. F. as a defendant herein; or by substituting the name of Christian Doe as the real name of the defendant, instead of Charles Doe, wherever the same occurs in said complaint.

**§ 4486. Adding or striking out parties.** The court may in furtherance of justice, and on such terms as may be proper, amend any pleading by adding or striking out parties.<sup>279</sup> The court will take notice of the want of necessary parties, and will ordinarily allow an amendment on just terms.<sup>280</sup>

<sup>279</sup> Cal. Code Civ. Pro., § 473; *Heslep v. Peters*, 3 Scam. 45; *Jackson v. Warren*, 32 Ill. 331; *Curtis v. Sage*, 35 id. 22; *Hamill v. Ashley*, 11 Col. 180; and see § 4486, *ante*.

<sup>280</sup> *Beals v. Cobb*, 51 Me. 348. The refusal of the trial court to allow an amendment substituting entirely new parties plaintiff is not such an abuse of discretion as would authorize the appellate court to interfere. *Liebman v. McGraw*, 3 Wash. St. 520.

§ 4487. **Discretion.** When the court perceives that necessary and indispensable parties are wanting,<sup>281</sup> it may grant leave to amend and bring them in,<sup>282</sup> in its discretion,<sup>283</sup> and on such terms as may be prescribed.<sup>284</sup> But such an amendment can not be made without leave of court.<sup>285</sup> But it has been held that an entire change of parties can not be allowed on amendment.<sup>286</sup>

§ 4488. **Motion; when made.** Whether, after striking out a party from the pleadings, the court can reinstate him, *quaere*.<sup>287</sup> On motion for nonsuit at the trial, plaintiff may be allowed to amend complaint by adding the name of a coplaintiff, on such terms as may be just,<sup>288</sup> even after the close of plaintiff's testimony.<sup>289</sup> The court may at any time allow an amendment by inserting the name of a firm, where an action is brought in the name of one partner only.<sup>290</sup>

§ 4489. **Special cases.** In an action of *assumpsit* against two defendants tried by the court, the plaintiff, after a verdict against him upon the ground that a joint promise was not proved, can not amend by striking out one of the defendants.<sup>291</sup> A suit may be amended by inserting the name of a partner of the firm.<sup>292</sup> In suit by a sheriff, for the use of execution creditors, the complaint may be amended by adding other execution creditors.<sup>293</sup> In ejectment, complaint may be amended by mak-

<sup>281</sup> *Mechanics' Bank v. Seton*, 1 Pet. 299.

<sup>282</sup> *Harrison v. Rowan*, 4 Wash. 202; *Dwight v. Humphreys*, 3 McLean, 104.

<sup>283</sup> *Van Epps v. Van Deusen*, 4 Paige Ch. 75; 25 Am. Dec. 516; *Vanderwerker v. Vanderwerker*, 7 Barb. 221; *Greenleaf v. Queen*, 1 Pet. 138.

<sup>284</sup> Cal. Code Civ. Pro., § 473; *Vanderwerker v. Vanderwerker*, 7 Barb. 221.

<sup>285</sup> *Rand v. Spear*, 5 How. Pr. 142.

<sup>286</sup> *Wright v. Storms*, 3 N. Y. Code R. 138; *Davis v. Schermerhorn*, 5 How. Pr. 440; *Vanderwerker v. Vanderwerker*, 7 Barb. 221.

<sup>287</sup> *Beach v. Covillaud*, 2 Cal. 237.

<sup>288</sup> 1 Van Santv. Pl. 134; *Mechanics' Bank v. Seton*, 1 Pet. 299; *Acquital v. Crowell*, 1 Cal. 191; *Heath v. Lent*, id. 412; *Farmer v. Cram*, 7 id. 135; *Browner v. Davis*, 15 id. 9; *Gavitt v. Doub*, 23 id. 78; *Valencia v. Couch*, 32 id. 340; 91 Am. Dec. 589.

<sup>289</sup> *Polk v. Coffin*, 9 Cal. 56; *Hurley v. Second Builders' Association*, 15 Abb. Pr. 206, note.

<sup>290</sup> *Dixon v. Dixon*, 19 Iowa, 512.

<sup>291</sup> *Griffin v. Simpson*, 45 N. H. 18.

<sup>292</sup> *Stuart v. Corning*, 32 Conn. 105.

<sup>293</sup> *Glenn v. Black*, 31 Ga. 393.



ing new parties plaintiff.<sup>294</sup> Or judgment creditors as subsequent incumbrancers may be made parties to the action.<sup>295</sup> In a suit on a foreclosure of mortgage, the complaint may be amended by making the original vendor a party defendant.<sup>296</sup>

**§ 4490. Striking out parties.** The misjoinder of parties may be corrected by amendment.<sup>297</sup> Such amendment may be made so as to exclude parties irregularly included,<sup>298</sup> even after judgment rendered.<sup>299</sup> Plaintiffs may be allowed to amend before trial by striking out the name of one of the defendants.<sup>300</sup> The court may allow an amendment of a complaint striking out the name of a plaintiff who was dead at the commencement of the suit.<sup>301</sup>

The amendment of a complaint by striking out of the caption the names of certain of the defendants who were not proper parties, without filing an amended complaint, while not commendable as a method of amending, is without prejudice to other defendants who are properly parties.<sup>302</sup>

**§ 4490a. Striking out demurrer — grounds of.** Under California practice, a demurrer can not be stricken out for want of proof of service, if filed in time, and the only possible grounds of striking out such a demurrer is the insertion of irrelevant and redundant matter in it as a pleading under section 53 of the Code of Civil Procedure, which can not apply when it states only one or more of the grounds enumerated in section 430 of that Code.<sup>303</sup>

**§ 4490b. Complaint — striking out evidentiary matter.** It is proper to strike from a complaint the statement of matter which,

<sup>294</sup> Chapin v. Curtenius, 15 Ill. 427.

<sup>295</sup> Horn v. Volcano Water Co., 13 Cal. 62; 73 Am. Dec. 569. As to effect of adding new parties, see Hurley v. Second Building Association, 15 Abb. Pr. 206, note; Elmore v. Vallette, 16 id. 249.

<sup>296</sup> Roddy v. Elam, 12 Rich. Eq. 343.

<sup>297</sup> Heath v. Lent, 1 Cal. 410; Beach v. Covilland, 2 id. 237.

<sup>298</sup> Mulliken v. Hull, 5 Cal. 246.

<sup>299</sup> Browner v. Davis, 15 Cal. 9.

<sup>300</sup> Bell v. Davis, 8 Barb. 210; Tobey v. Clafflin, 3 Sumn. 379.

<sup>301</sup> Jemison v. Smith, 37 Ala. 185.

<sup>302</sup> Doane v. Houston, 75 Cal. 360.

<sup>303</sup> Davis v. Honey Lake Water Co., 98 Cal. 415. Under Oregon practice, a demurrer can not be stricken out on motion. Cohen v. Ottenheimer, 13 Oreg. 220; and see The Victorian, 24 id. 121; 41 Am. St. Rep. 838.

though it may be proper to be shown in evidence upon the trial of the action, adds nothing to the ultimate and issuable facts alleged in the complaint.<sup>304</sup>

**§ 4490c. Striking out — miscellaneous points of practice.** Where a complaint contains an immaterial averment which ought to have been stricken out on motion, but the party making such motion answered over, and the court made no declaration of law upon the trial respecting such immaterial averment, and it did not appear that the appellant was in any manner prejudiced by such error of the court in refusing to strike such immaterial matter from the pleading, the judgment will not be reversed.<sup>305</sup>

A motion to strike out material portions of a judgment can not be made after the judgment has been affirmed on appeal, and the *remittitur* filed in the lower court, where all the questions involved in the motion might have been brought before the court and determined on the appeal.<sup>306</sup>

Where an answer has been amended and different facts presented, the denial of a motion to strike out new matter in the first answer does not establish the law of the case so as to control the court in a ruling upon a motion for judgment on the pleadings made after such amendment.<sup>307</sup>

<sup>304</sup> *County of San Joaquin v. Budd*, 96 Cal. 47.

<sup>305</sup> *Thomas v. Herrall*, 18 Oreg. 546.

<sup>306</sup> *Parker v. Bernal*, 68 Cal. 122.

<sup>307</sup> *Fisher v. Briscoe*, 10 Mont. 124; distinguishing *Newell v. Meyendorff*, 9 Mont. 254; 18 Am. St. Rep. 746.

## CHAPTER V.

### SUBSTITUTION OF PARTIES, AND CONTINUANCE OF CAUSE.

§ 4491. **In general.** An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of any disability of a party, the court on motion may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding.<sup>1</sup> It has been the uniform practice in California to permit the substitution to be made, on the suggestion of the death of the former party and satisfactory proof, on an *ex parte* motion, of the appointment and qualification of the administrator.<sup>2</sup> In ejectment, if plaintiff parts with the title pending the action, it may be continued in his name unless the grantee applies to be substituted.<sup>3</sup> And if one purchases from the lessor of a defendant in ejectment, the purchaser is entitled to continue the defense either in the name of the tenant, or to be substituted in his place.<sup>4</sup> In ejectment, the cause of action survives on the death of a party.<sup>5</sup>

<sup>1</sup> Cal. Code Civ. Pro., § 385.

<sup>2</sup> Taylor v. W. P. R. R. Co., 45 Cal. 337; see, also, Johnson v. Superior Court, 60 Id. 578; Strong v. Eldridge, 8 Wash. St. 595; Campbell v. West, 93 Cal. 653.

<sup>3</sup> Camarillo v. Fenlon, 49 Cal. 202; Barstow v. Newman, 34 Id. 90; Moss v. Shear, 30 Id. 467; see Smith v. Harrington, 3 Wyo. 503. Substitution of execution creditor as defendant in replevin. France v. First Nat. Bank, 3 Wyo. 187. In an action of replevin, where the defendant pleaded title and right of possession to the property, the court properly allowed the action upon the defendant's death to be continued by his personal representative. O'Neil v. Murry, 6 Dak. 107.

<sup>4</sup> Mastick v. Thorp, 29 Cal. 446.

<sup>5</sup> Barrett v. Birge, 50 Cal. 655.

**§ 4492. Affidavit for substitution by assignee of plaintiff.***Form No. 1100.*

[TITLE.]

[VENUE.]

E. F., being duly sworn, deposes and says:

I. That on or about the ..... day of ....., 18.., one A. B. commenced an action in this court against one C. D. for [here state the cause of action]; that issue was joined therein by the service and filing of the defendant's answer on the ..... day of ....., 18..; that said cause is upon the calendar of this court awaiting trial.

II. That on the ..... day of ....., 18.., and while said action was still pending, said A. B., plaintiff in said action, duly assigned and transferred the [promissory note] in the complaint mentioned, for a valuable consideration, to affiant, who is now the owner and holder thereof [or sold and conveyed to affiant all his right, title, and interest in and to the real property in controversy in this action, and that affiant is now the owner thereof.]

Wherefore affiant prays that he may be substituted as plaintiff in said action in place of said A. B. and that said action may be continued in his name, and that he may have such other relief as may be just.

[JURAT.]

[SIGNATURE.]

**§ 4493. Bankruptcy.** The bankruptcy of a party against whom a judgment has been rendered, though adjudicated before appeal taken, will not prevent the prosecution of the appeal in his name. The appeal may be prosecuted either in the name of the bankrupt or of his assignee.<sup>6</sup>

**§ 4494. Transfer of interest.** That clause of section 121 of the New York Code, which provides that in case of "any other" transfer of interest the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action, contemplates a transfer other than by death — contemplates an existing, pending action, and the substitution of one person in the place of another.<sup>7</sup> After the issues in a cause are all made

<sup>6</sup> O'Neil v. Dougherty, 46 Cal. 575. Substitution of receiver for defendant. See Jackson v. Dines, 13 Col. 90.

<sup>7</sup> Kissam v. Hamilton, 20 How. Pr. 369; but see Cal. Code Civ. Pro., § 385.

up, a person claiming to be assignee of a cause of action may be substituted as plaintiff, and if so substituted, need not file a supplemental complaint;<sup>8</sup> he takes the place of the original plaintiff, who ceases to be a party to the suit.<sup>9</sup> Where a person claiming to be assignee of a cause of action is substituted as plaintiff, and the cause proceeds and a judgment is rendered in his name it is too late to object in the appellate court that he did not file a supplemental complaint showing his interest.<sup>10</sup>

**§ 4495. Affidavit by husband after marriage of female plaintiff to continue cause in joint names of husband and wife.**

*Form No. 1101.*

[TITLE.]

[VENUE.]

I. [As in form 1100.]

II. That pending said action, and on the ..... day of ....., 18.., the said A. B. was married to this affiant E. F., who thereby became, and now is, a necessary party plaintiff herein, as he is advised and believes.

Wherefore affiant prays the order of this court that said action may be continued by said A. B. and this affiant jointly as plaintiffs, against said C. D., and that they may have leave to amend the complaint as they may be advised, and such other relief as may be just.<sup>11</sup>

[JURAT.]

[SIGNATURE.]

**§ 4496. Order by consent substituting administrator as plaintiff, without prejudice to proceedings.**

*Form No. 1102.*

[TITLE.]

On reading and filing the affidavit of E. F., showing the death of A. B., the plaintiff in the above-entitled action, and the granting of letters of administration to P. Q., by the Probate Court of the county of ....., and on motion of E. F.,

<sup>8</sup> Virgin v. Brubaker, 4 Nev. 31.

<sup>9</sup> Id.

<sup>10</sup> Id. Substitution of transferee of interest. See Smith v. Harrington, 3 Wyo. 503; Malone v. Mining Co., 93 Cal. 384.

<sup>11</sup> See Cal. Code Civ. Pro., §§ 370, 385. In the practice, where the names of the parties to an action have to be changed, it is usually done by suggestion or stipulation only; for in the case of the death of one of the parties, or marriage of one of them, the labor of drawing up formal affidavits and petitions is by our practice generally dispensed with.

the plaintiff's attorney, the defendant's attorney consenting thereto:

It is ordered that this action be and the same is hereby revived and continued in the name of the said P. Q., administrator of the estate of A. B., deceased, as plaintiff; and that the said administrator be and he is hereby substituted as plaintiff in the place and stead of the said A. B., deceased, and that such revivor and continuance be without prejudice to any of the proceedings already had in this action.<sup>12</sup>

[DATE.]

[SIGNATURE.]

§ 4497. **Death, effect of.** If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment is not a lien on real estate, but must be paid in due course of administration.<sup>13</sup> In such case, however, it is error to move for new trial or to take appeal, without suggesting the death and bringing in the representative of the deceased, of which such representative must be notified.<sup>14</sup> If such representative is substituted on motion of the adverse party but no notice is given to him, nor does he appear, and the deceased is named in the judgment, the executor is not affected by it, and the judgment as to him is a nullity.<sup>15</sup> The death of the wife without issue after suit brought by herself and husband for the homestead defeats a recovery by the husband, though the right to recover existed at the commencement of the suit.<sup>16</sup>

§ 4498. **Partition.** In a suit in chancery for partition, one of the defendants died after the bill had been taken as confessed as against him. The suit was prosecuted to judgment without bringing in his heirs (who were not parties to the suit), and after sale under the judgment and delivery of the master's deed, an order was made reviving the suit against his heirs, who thereafter made application to the court in relation to the disposition of the proceeds; it was held that the heirs were not bound by the decree. By the death of their ancestor the action be-

<sup>12</sup> For petition, consent, and order for the substitution as plaintiff of the successor in trust of a deceased plaintiff, see *Emerson v. Bleakley*, 5 Abb. Pr. (N. S.) 350.

<sup>13</sup> Cal. Code Civ. Pro., § 669.

<sup>14</sup> *Judson v. Love*, 35 Cal. 463; *Shartzer v. Love*, 40 id. 93.

<sup>15</sup> *McCreery v. Everding*, 44 Cal. 284.

<sup>16</sup> *Gee v. Moore*, 14 Cal. 472.

came defective, and the title which he had at the time of his death could not be affected without bringing in those who succeeded to his interests.<sup>17</sup>

§ 4499. **Practice.** The death of a party *pendente lite* should be made known by suggestion of that fact to the court, and the action continued by order of the court against the representative of the party deceased, of which he must be duly notified before he can be affected by further proceedings in the action.<sup>18</sup> Where, in an action by J. against L. and others, L. died after verdict rendered for defendants and thereafter J. moved for a new trial, without suggestion made of the death of L., or a substitute of his successor in interest, and appealed from the judgment rendered on the verdict, and an order denying a new trial, it is held that all said proceedings, except the rendition of judgment upon said verdict, were void, and that the appeal as to L. should be dismissed.<sup>19</sup> Where a party litigant dies after a verdict, the authority of the attorney to act for him is thereby determined, and he can neither give nor receive notice of motion for new trial or appeal.<sup>20</sup>

§ 4500. **Order conclusive.** An order of revivor in the name of A. "as executor" of a deceased plaintiff, standing in full force at the time of the trial, is conclusive to show that the action has been properly revived, and that A. can recover all that the testator might have recovered.<sup>21</sup>

§ 4500a. **Substitution of parties — matters of practice, etc.** Where, after the commencement of an action, the plaintiff has become insane, it is error to substitute his guardian as sole plaintiff, but the suit should be prosecuted in the name of the plaintiff, as an insane person, by his guardian.<sup>22</sup> An erroneous order, making such substitution, should not be given effect as a dismissal of the action as to the incompetent plaintiff.<sup>23</sup> Where, pending an action, there is a transfer of interest which

<sup>17</sup> *Randall v. Mumford*, 18 Ves. 424; *Story's Eq. Pl.*, §§ 329, 331, 354, 369; *Hind's Ch. Pr.* 46; *Kelly v. Hooper*, 3 Yerg. 395; *Garr v. Gomez*, 9 Wend. 649; *Mandeville v. Riggs*, 2 Pet. 482, 487.

<sup>18</sup> *Judson v. Love*, 35 Cal. 463.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Underhill v. Crawford*, 29 Barb. 664; *S. C.*, 18 How. Pr. 112.

<sup>22</sup> *Justice v. Ott*, 87 Cal. 530; *O'Shea v. Wilkinson*, 95 *id.* 454.

<sup>23</sup> *Dixon v. Cardozo*, 106 Cal. 506.

is set up by a supplemental complaint, a judgment in favor of the transferee will be reversed if there be no order of the court substituting him as in the action.<sup>24</sup> If a party to an action die after the rendition of judgment, and before filing and serving notice of appeal, the authority of the deceased's attorney to act terminates, and any subsequent action of the attorney, before substitution, will not bind the representatives of the deceased, or any other party in interest.<sup>25</sup> Where the court has acquired no jurisdiction of the administrator of an estate, or of the subject-matter of the litigation, it has no power to substitute another party to the action, and a motion for that purpose will be overruled.<sup>26</sup>

**§ 4501. Affidavit by defendant to have plaintiff's executor substituted.**<sup>27</sup>

*Form No. 1103.*

[TITLE.]

[VENUE.]

S. T., being duly sworn, deposes and says, I am the defendant in the above-entitled action:

I. That on or about the ..... day of ....., 18.., the above-named A. B. commenced an action in this court against this affiant, for [state cause of the action and condition, as in form 1100, and if defendant has asked affirmative relief in his answer, set it forth].

II. That affiant is informed and believes that A. B., the above-named plaintiff, died on or about the ..... day of ....., 18.., last, having first made and published his last will and testament in due form of law, by which, among other things, he appointed P. Q. his executor; that said will has been duly admitted to probate in the Probate Court of the county of ....., and letters testamentary issued to the said P. Q., on the ..... day of ....., A. D. 18.., and he has duly qualified and entered upon his duties as such executor, but to the best of affiant's information and belief, has hitherto failed to make any application to have the above-entitled action continued by him as plaintiff.

<sup>24</sup> *Lowell v. Parkinson*, 4 Utah, 64; compare *Thomas v. Morris*, 7 *id.* 284.

<sup>25</sup> *Coffin v. Edgington*, 2 Idaho, 595.

<sup>26</sup> *McCormick Harvesting Co. v. Snedigar*, 3 S. Dak. 624.

<sup>27</sup> Sufficiency of affidavit by third person, asking to be substituted as plaintiff in ejectment. See *Smith v. Harrington*, 3 Wyo. 503.



Wherefore affiant prays that the above-entitled action may be continued in the name of said executor, or that the complaint herein be dismissed, or for such other order as may be just.

[JURAT.]

[SIGNATURE.]

**§ 4502. Notice of motion on behalf of defendant for substitution of plaintiff's executor.**

*Form No. 1104.*

[TITLE.]

[ADDRESS.]

Please take notice that on the affidavit, a copy of which is herewith served, and the papers on file in this cause, the undersigned will move the court, at the courtroom thereof, at ....., on the ..... day of ....., 18.., at the hour of ..... in the forenoon, or as soon thereafter as counsel can be heard, for an order directing the above-entitled action to be continued by P. Q., as executor of the last will and testament of [or administrator of the estate of] C. D., plaintiff above named, deceased, in the place of said deceased plaintiff.

[DATE.]

[SIGNATURE.]

**§ 4503. Order of substitution.**

*Form No. 1105.*

[TITLE.]

On reading and filing the affidavit of J. R., dated the ..... day of ....., 18.., and the pleadings in this action, and proof of due service of notice of this motion, and on motion of S. T., counsel for defendant, and after hearing G. H., of counsel for said P. Q., executor of A. B., the deceased plaintiff.

It is ordered [etc., as in No. 1102].<sup>28</sup>

[DATE.]

[SIGNATURE.]

**§ 4504. Substitution of papers.** If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.<sup>29</sup>

<sup>28</sup> In case this order is made without notice, as it often is in practice, the form should be varied accordingly, and the executor notified of its entry: which is generally done by serving a copy of the order on him. The correct practice is to enter an order of substitution of a party in the minutes as a distinct order made before judgment. *Cockrill v. Clyma*, 98 Cal. 123.

<sup>29</sup> Cal. Code Civ. Pro., § 1045. There can be no judgment without pleadings on file, original or substituted. *Grimison v. Russell*, 11 Neb. 469.

**§ 4505. Affidavit for supplying the place of a lost pleading.**  
*Form No. 1106.*

[TITLE.]

[VENUE.]

I. On the ..... day of ....., 18..., a complaint was filed in the above-named court, in this action, of which the following is a true copy.

II. That the said original complaint has been lost or mislaid, and that after the search made by the clerk of the said court, the same can not be found.

III. That this affiant does not know where the said original complaint now is.

**§ 4506. Lost pleading.** If a pleading be lost, it can only be supplied by motion based on affidavits showing what the lost pleading contained; and a service of personal notice of motion on the opposite party must be sufficiently explicit in form to enable him to controvert the affidavits submitted.<sup>30</sup> Substitution of pleadings or papers in a case is always within the discretion of the court:<sup>31</sup> and no notice of the motion to apply for it need be given when the notice of it can be of no use.<sup>32</sup>

<sup>30</sup> *People v. Cazalis*, 27 Cal. 522.

<sup>31</sup> *Benedict v. Cozzens*, 4 Cal. 381.

<sup>32</sup> *Id.*

## CHAPTER VI.

### INTERVENTION, INTERPLEADER, ETC.

§ 4507. **Intervention.** Any person may, before the trial, intervene in an action or proceeding, who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both. An intervention takes place when a third person is permitted to become a party to an action between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding anything adversely to both the plaintiff and the defendant, and is made by complaint, setting forth the grounds upon which the intervention rests, filed by leave of the court, and served upon the parties to the action or proceeding who have not appeared, and upon the attorneys of the parties who have appeared, who may answer or demur to it as if it were an original complaint.<sup>1</sup> The order allowing an intervention may be made *ex parte*.<sup>2</sup> Whatever its form, it seems that under the statute the plea of an intervenor is now called a complaint. It can

<sup>1</sup> Cal. Code Civ. Pro., § 387. The right to intervene under this section is not limited to any particular kind or class of actions, but is general. *Robinson v. Transp. Co.*, 93 Cal. 316. And the fact that the intervenor might protect his interest in some other way is immaterial. *Coffey v. Greenfield*, 55 Cal. 382. The right is purely statutory, and the statute prescribes the mode of exercising it. *Chase v. Evoy*, 58 Cal. 348, 355. The right to intervene may be exercised at any time before trial of the action. *Ooburn v. Smart*, 53 Cal. 742; but an intervention can not be allowed after final judgment. *Owens v. Colgan*, 97 Cal. 454; *Baines v. West Coast Lumber Co.*, 104 id. 1; *Louis v. Biscalluz*, 101 id. 330. Good practice requires the petition to be filed before the trial is entered upon. *Rockwell v. Coffey*, 20 Col. 397. But the petition is in time, although not filed until after a motion in the principal action for a default against the defendant. *Thompson v. Huron Lumber Co.*, 4 Wash. St. 600. Who may intervene. *Martin v. McCarthy*, 3 Col. App. 37; *Morey v. Lett*, 18 Col. 128.

<sup>2</sup> *Spanagel v. Reay*, 47 Cal. 608; *Kimball v. Richardson-Kimball Co.*, 111 id. 396.

not be filed without leave of the court, and prudence would suggest that it should appear that leave was obtained. If the petition is insufficient as to facts, the objection can be taken at any time.<sup>3</sup>

**§ 4508. Commencement of complaint by intervenor.**

*Form No. 1107.*

[TITLE.]

Now comes R. S., and by leave of the court first had and obtained, files this as his complaint in intervention in the above-entitled cause, and as the grounds of his intervention alleges [state facts showing the right to intervene, and set forth cause of action or defense as in ordinary complaint or answer].

[DEMAND FOR RELIEF.]

[VERIFICATION.]

**§ 4509. Order allowing intervention.**

*Form No. 1108.*

The foregoing complaint in intervention having been this day presented to me in open court, and leave asked to file the same by E. F., attorney for R. S., the intervenor named therein, it appearing that good cause exists therefor, it is ordered that leave be and is hereby granted to file the same, and that said R. S. be permitted to intervene in said cause.<sup>4</sup>

[DATE.]

[SIGNATURE OF JUDGE.]

**§ 4510. Appeal.** The right of an intervenor to take an appeal is immediate upon the sustaining of an objection, by demurrer, to his right to intervene.<sup>5</sup> If pleadings in intervention are filed in the court below without objection, and the parties go to trial without objecting, they can not afterwards on appeal raise the objection that it was irregular and erroneous to permit an intervention.<sup>6</sup>

**§ 4511. Assignees.** An assignee *pendente lite* of part of the subject-matter of the controversy may be brought in.<sup>7</sup> An assignee in bankruptcy or insolvency, but only on his own appli-

<sup>3</sup> Harlan v. Eureka M. Co., 10 Nev. 92.

<sup>4</sup> The above form is drawn to be appended to the complaint in intervention, but the order may be entered as a minute order, in which case it can be modified accordingly.

<sup>5</sup> Stich v. Dickinson, Goldner Intervenor, 38 Cal. 608; see Henry v. Insurance Co., 16 Col. 179.

<sup>6</sup> McKenty v. Gladwin, 10 Cal. 227; Smith v. Penny, 44 id. 161.

<sup>7</sup> McGown v. Leavenworth, 2 E. D. Smith, 24.

cation,<sup>8</sup> and an assignee applying to be made defendant in an action for conversion of property, must show some right thereto.<sup>9</sup> If the owner of a claim assigns it absolutely, retaining, however, an interest in it, he may intervene to protect his interest in an action brought by the assignee to collect the same, and if he does not intervene, he is bound by the judgment.<sup>10</sup> Where parties succeed to the interest of the defendant in the premises, after the commencement of the action, and before answer filed, they may be allowed to defend.<sup>11</sup>

§ 4512. **Attachment suits** In an attachment suit, judgment creditors of defendant may intervene to set aside the attachment, because void as to them.<sup>12</sup> In an action to recover money on which an attachment has been issued and levied upon property of the defendant, a subsequent attaching creditor may intervene at any time before the entry of judgment, for the purpose of contesting the validity of the first attachment.<sup>13</sup> And the allegations in the pleading, on the part of the intervenor, traversing the complaint, have the same effect as denials in the answer, and require affirmative proof by the plaintiff of his cause of action, in default of which the intervenor will have judgment in his favor.<sup>14</sup> Subsequent attaching creditors may intervene in a suit of the prior attaching creditor and the common debtor, when they allege that there is nothing due to said first creditor, and that the object is to hinder, delay, and defraud other creditors.<sup>15</sup> The intervenors become defendants, and as they allege that the plaintiff is not entitled to recover, it amounts to a denial of the facts set forth in the complaint, and consequently

<sup>8</sup> *Cleveland v. Boerum*, 3 Abb. Pr. 294. An assignee for the benefit of creditors, in the absence of peculiar facts, has no such interest in the "matter in litigation" as entitles him to intervene to defend a purely personal action against his assignor. *McClurg v. State Bindery Co.*, 3 S. Dak. 362; 44 Am. St. Rep. 799; and see *Meyer v. Black*, 4 N. Mex. 190.

<sup>9</sup> *Gunther v. Greenfield*, 8 Abb. Pr. (N. S.) 191.

<sup>10</sup> *Gradwohl v. Harris*, 29 Cal. 150.

<sup>11</sup> *McFadden v. Wallace*, 38 Cal. 51.

<sup>12</sup> *Davis v. Eppinger*, 18 Cal. 378; 79 Am. Dec. 184; also, *Kimball v. Richardson-Kimball Co.*, 111 Cal. 386; *Hawes v. Clement*, 64 Wis. 152; *Tim v. Smith*, 93 N. Y. 87; *Goodbar v. National Bank*, 78 Tex. 461.

<sup>13</sup> *Speyer v. Ihmels*, 21 Cal. 280; 81 Am. Dec. 157.

<sup>14</sup> *Id.*

<sup>15</sup> *Speyer v. Ihmels*, 21 Cal. 280; 81 Am. Dec. 157.

the *onus probandi* is on the plaintiff; and if he fails to prove his case, even though the real defendants have made default, judgment will be given in favor of the intervenors against him, and in his favor against the real defendants.<sup>16</sup> Where a subsequent attaching creditor has his attachment levied on the property previously levied on by a prior attaching creditor, he is entitled to intervene in the action between the first attaching creditor and the defendant, if the first attachment was fraudulently procured, and the common debtor has not sufficient property to pay both claims.<sup>17</sup>

§ 4513. **Dismissal.** Where plaintiffs brought suit to foreclose a lien, and other parties intervened as lien claimants, and after an appearance by the defendants plaintiff filed a dismissal of the suit, it was held that the dismissal could not affect the rights of the intervenors, and they had a right to an adjudication as between themselves and the defendants.<sup>18</sup> Nonsuit of plaintiff is not a dismissal as to an intervenor, whose intervention defendant has answered.<sup>19</sup> A motion to dismiss an intervention should point out the precise ground on which it is made.<sup>20</sup>

§ 4514. **Ejectment.** In ejectment, a person who is no way connected with the right of possession asserted by the plaintiff or the defendant, but, on the contrary, alleges title in himself paramount to both, can not intervene.<sup>21</sup> If, however, plaintiff and the intervenor agree upon the facts, and stipulate that the claim of the intervenor shall be determined upon the legal effect of the stipulated facts, plaintiff can not afterwards object that the case is not a proper one for intervention.<sup>22</sup>

§ 4515. **Foreclosure.** A simple contract creditor of a common debtor can not intervene in a foreclosure suit. But judgment creditors, being as such subsequent incumbrancers, may intervene; and a court may order them to be made parties, probably

<sup>16</sup> *Speyer v. Ihmels*, 21 Cal. 280; 81 Am. Dec. 157.

<sup>17</sup> *Coghill v. Marks*, 29 Cal. 673; but see *Dixey v. Pollock*, 8 id. 570.

<sup>18</sup> *Elliott v. Ivers*, 6 Nev. 287.

<sup>19</sup> *Poehlmann v. Kennedy*, 48 Cal. 201.

<sup>20</sup> *Id.*

<sup>21</sup> *Porter v. Garrissino*, 51 Cal. 559; and see *Rosecrans v. Ellsworth*, 52 id. 509. Intervention by landlord in ejectment against tenant in possession. See *Reay v. Butler*, 69 Cal. 572.

<sup>22</sup> *Donner v. Palmer*, 51 Cal. 629.

by an amendment of the complaint as the better course, or on petition of intervention.<sup>23</sup> In a suit on a note and mortgage, where creditors of the defendant intervened, alleging the note and mortgage to be fraudulent as against them, the intervenors can not prevent a judgment for plaintiff against defendant. The most they can claim is protection against the enforcement of the judgment to their prejudice.<sup>24</sup> In an action to foreclose a mortgage upon property claimed as a homestead, the wife should be allowed to intervene.<sup>25</sup>

**§ 4516. Interest of parties.** The interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. It must be that created by a claim to the demand, or some part thereof, in suit, or a claim to or lien upon the property, or some part thereof, which is the subject of litigation.<sup>26</sup> To authorize an intervention, therefore, the interest must be that created by a claim to the demand, or some part thereof, in suit or a claim to or lien upon the property, or some part thereof, which is the subject of litigation.<sup>27</sup>

<sup>23</sup> *Horn v. Volcano Water Co.*, 13 Cal. 62; 73 Am. Dec. 569.

<sup>24</sup> *Id.*; compare *Henry v. Insurance Co.*, 16 Col. 179.

<sup>25</sup> *Sargent v. Wilson*, 5 Cal. 504; *Marks v. Marsh*, 9 *id.* 96; *Moss v. Warner*, 10 *id.* 296; *Mabury v. Ruiz*, 58 *id.* 11.

<sup>26</sup> *Horn v. Volcano Water Co.*, 13 Cal. 62; 73 Am. Dec. 569; *Harlan v. Eureka M. Co.*, 10 Nev. 92; *Henry v. Insurance Co.*, 16 Col. 179; and see *Wood v. Water Works Co.*, 20 *id.* 253, 266.

<sup>27</sup> *Horn v. Volcano Water Co.*, 13 Cal. 70; 73 Am. Dec. 569; cited in *Stich v. Dickinson*, 38 Cal. 608; *Brooks v. Hager*, 5 *id.* 281; *Yetzer v. Young*, 3 S. Dak. 203. In an action by the holder of a chattel mortgage against the mortgagor for the possession of the mortgaged property, a mere judgment creditor, without lien by levy of execution or attachment, is not entitled to intervene for the purpose of showing the mortgage paid or fraudulent. *Id.*; and see *Bennett v. Whitcomb*, 25 Minn. 148. Intervention proceedings are to be liberally construed, with the view to assist parties in obtaining justice. And in determining whether a party is entitled to intervene, the averments of the petition, so far as they are well pleaded and not denied, are to be taken as true. *Henry v. Insurance Co.*, 16 Col. 179. So, it is within the discretion of the trial court to allow an intervenor to amend his complaint at the trial to conform to the proofs, and it is not error to allow such amendment. *Ward v. Waterman*, 85 Cal. 491; and see *Majors v. Taussig*, 20 Col. 44.

§ 4517. **Mechanic's lien.** In a suit to enforce a mechanic's lien on a ditch, a mortgagor of the ditch subsequent to the lien has no absolute right of intervention. And when the suit had been pending some time, and the application to intervene was made just as plaintiff was taking judgment, the application was properly refused.<sup>28</sup> The filing of an intervention in an action to foreclose a mechanic's lien within the prescribed statutory time, and becoming parties to the suit during the existence of the lien, is the same as commencing an original action.<sup>29</sup>

§ 4518. **Nonsuit.** Where the intervenor claims an interest adverse to both plaintiff and defendant, and plaintiff answers the intervention raising material issues, his right to be heard thereon is not affected by nonsuit granted on motion of defendant. The action is still pending as to such issues, and should be tried, not dismissed.<sup>30</sup>

§ 4519. **Ordering in necessary parties.** When a complete determination of the controversy can not be had without the presence of other parties, the court must order them to be brought in. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment.<sup>31</sup> The court may, on its own motion, order in necessary parties;<sup>32</sup> but will not, on motion of defendant and against the will of plaintiff, bring in other parties unless their presence is necessary.<sup>33</sup> And if the plaintiff chooses to waive any relief which would render the presence of other parties necessary, and take judgment for that only to which he is entitled as against defendants already in court, and as to which a complete determination can be had, the court may award the

<sup>28</sup> *Hocker v. Kelley*, 14 Cal. 164.

<sup>29</sup> *Mars v. McKay*, 14 Cal. 127.

<sup>30</sup> *Poehlmann v. Kennedy*, 48 Cal. 201.

<sup>31</sup> Cal. Code Civ. Pro., § 389; see, also, N. Y. Code, § 452; and Stats. Oregon, § 40; 1 Van Santv. Eq. Pr. 121.

<sup>32</sup> *Settembre v. Putnam*, 30 Cal. 490; see, also, *Grain v. Aldrich*, 38 Id. 514; 99 Am. Dec. 423.

<sup>33</sup> *Sawyer v. Chambers*, 11 Abb. Pr. 110. If a court on the trial makes an order that certain persons be permitted to appear and answer on the erroneous supposition that they are necessary parties, such persons are not intervenors, and do not become parties to the action. *Chase v. Evoy*, 58 Cal. 348, 355.



latter relief without the addition of other parties.<sup>34</sup> The phrase "when a complete determination," etc., means that there are persons not parties whose rights must be ascertained and settled before the rights of the parties to the suit can be determined.<sup>35</sup> As a court of equity will not permit litigation by piecemeal, and as the whole subject-matter and all the parties should be before it, to determine once and forever their respective claims, the court will order them to be brought in.<sup>36</sup> And it is the imperative duty of the court in such case to order the parties in,<sup>37</sup> although such parties be nonresidents.<sup>38</sup>

§ 4520. **Specific performance.** In an action against several for a specific performance of their joint contract to purchase real estate of the plaintiff, and secure a part of the price by their bond and mortgage, the court will not proceed unless all parties are in.<sup>39</sup>

§ 4521. **Sureties.** Sureties may be let in to defend upon proper application, in the place of their principal.<sup>40</sup> But if a party who has given a bond of indemnity to a sheriff takes charge of the defense in an action against the sheriff and defends it by his own attorney, though done in the sheriff's name, the judgment against the sheriff is conclusive against the party giving the bond; as he might have intervened and defended as party to the record, had he so chosen, and did as a party in interest.<sup>41</sup>

§ 4522. **Tax.** A. & Co. having on general deposit with B. & Co. seventy-five thousand dollars, a tax for county purposes was levied thereon, and payment demanded of both A. & Co.

<sup>34</sup> *Settembre v. Putnam, supra.*

<sup>35</sup> *McMahon v. Allen*, 12 How. Pr. 39.

<sup>36</sup> *Wilson v. Lassen*, 5 Cal. 114; *Ord v. McKee*, id. 515; *Shaver v. Brainard*, 29 Barb. 25.

<sup>37</sup> *Tonnelle v. Hall*, 3 Abb. Pr. 205; *Davis v. Mayor of New York*, 2 Duer, 663; but see S. C., 14 N. Y. 506.

<sup>38</sup> *Sturtevant v. Brewer*, 17 How. Pr. 571; S. C., 9 Abb. Pr. 414.

<sup>39</sup> *Powell v. Finch*, 5 Duer, 666.

<sup>40</sup> *Jewett v. Crane*, 13 Abb. Pr. 97; 35 Barb. 208.

<sup>41</sup> *Dutil v. Pacheco*, 21 Cal. 441; 82 Am. Dec. 749. The sureties of a defendant, in an action of replevin, upon an undertaking given to effect a return of the property in controversy to the defendant pending the action, have an interest in the action which entitles them to intervene if the defendant is insolvent and the action is not being defended in good faith. *Coburn v. Smart*, 53 Cal. 742.

and B. & Co.; it was held that the county might intervene in an action concerning the money to recover said tax.<sup>42</sup>

§ 4523. *Who may intervene.* Where one tenant in common sues to recover possession of the premises, and the damages sustained by the ouster, his cotenants can not intervene.<sup>43</sup> Persons who ought to have been joined as parties, but who were not, may apply to come in, and if there are no laches on their part, may apply to come in at any time before final judgment.<sup>44</sup> A judgment creditor of a deceased person is not entitled to be made a party to a suit in partition between his heirs and those entitled to his real property.<sup>45</sup> Where a man brought suit to annul a second marriage on the ground that he had a former wife living, and obtained a decree for want of an answer, and then married a third wife; and subsequently the second wife opened the judgment against her marriage on the ground of fraud; and then the third wife was allowed to intervene, and she put in an answer alleging the invalidity of both former marriages and the validity of her own; it was held that both such former marriages could not be adjudged void without an amendment to the complaint.<sup>46</sup>

§ 4524. *Order to bring in necessary parties, without motion.*

*Form No. 1109.*

[TITLE.]

I. This cause coming on to be tried, and it appearing to the court that S. T. is a necessary party to a complete determination of the controversy:

II. It is ordered that the summons and complaint in this action be amended by the addition of S. T. as a defendant therein; that the plaintiff cause the said S. T. to be duly served with a copy of the said summons and complaint, further amended as he may be advised, within . . . . . days from the date of this order; that the said S. T. have . . . . . days to answer the complaint, after such service; and that the trial of this cause be postponed until the expiration of said . . . . . days allowed the said S. T. to answer as aforesaid.

<sup>42</sup> *Yuba Co. v. Adams*, 7 Cal. 37.

<sup>43</sup> *Donner v. Palmer, Bradley Intervenor*, Cal. Sup. Ct., October term, 1867 (not reported).

<sup>44</sup> *Hubbard v. Eames*, 22 Barb. 597.

<sup>45</sup> *Waring v. Waring*, 3 Abb. Pr. 246.

<sup>46</sup> *Anon.*, 15 Abb. Pr. (N. S.) 171.

§ 4524a. **Intervention — miscellaneous cases — pleading.** The denial of a petition to intervene in an action to establish a trust in certain real estate in favor of the plaintiff, by one claiming the legal title to and possession of a certain portion of the premises involved, is not erroneous, where it does not appear that the rights or remedies of the intervenor could be affected by a judgment between the parties to the suit.<sup>47</sup> In an action of accounting between partners, firm creditors may join in an intervention for the purpose of sharing in a fund in the hands of one of the partners, resulting from a fraudulent sale by him of the firm property.<sup>48</sup> So, a mortgagee of personal property who is entitled by the terms of his mortgage to immediate possession may intervene in an action by a third person against the mortgagor to recover the specific property, and his right to intervene is not affected by the plaintiff taking possession of the property at the commencement of the action on giving a bond as the statute provides.<sup>49</sup> In an action for damages for trespass alleged to have been committed by the defendant in entering upon the plaintiff's land, and constructing and using a roadway across the same, one claiming a grant of a right of way over the land from the plaintiff, and who shows himself to be the real party in interest, and the one by whose order, and in whose employment the acts complained of were done, has the right to intervene.<sup>50</sup> In an action by one of two water companies claiming the exclusive privilege of supplying water to a certain town and its inhabitants, a temporary injunction was granted restraining the other company from supplying the water — and it was held that certain residents of the town, under the facts and circumstances set forth in their petition, were entitled to intervene and become parties for the purpose of contesting the exclusive privilege asserted by the plaintiff company.<sup>51</sup> Where the whole complaint in intervention is not set out in the record, it will be presumed upon appeal that a demurrer thereto was properly overruled.<sup>52</sup> All the averments of an answer to a complaint in intervention must be considered as denied by the intervenor.<sup>53</sup>

<sup>47</sup> *Curtis v. Lathrop*, 12 Col. 169; compare *Coffey v. Greenfield*, 55 Cal. 382; *Ward v. Waterman*, 85 id. 488.

<sup>48</sup> *Grossini v. Perazzo*, 66 Cal. 545.

<sup>49</sup> *Martin v. Thompson*, 63 Cal. 3.

<sup>50</sup> *Robinson v. Crescent City, etc., Co.*, 93 Cal. 316.

<sup>51</sup> *Wood v. Water Works Co.*, 20 Col. 253.

<sup>52</sup> *Kimball v. Richardson-Kimball Co.*, 111 Cal. 386.

<sup>53</sup> *Pearson v. Creed*, 78 Cal. 144.

§ 4525. **Interpleader.** A defendant against whom an action is pending upon a contract, or for specific personal property, may at any time before answer, upon affidavit that a person not a party to the action makes against him, and without any collusion with him, a demand upon the same contract or for the same property, upon notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount claimed on the contract, or delivering the property or its value to such person as the court may direct; and the court may, in its discretion, make the order.<sup>54</sup> The granting of the order is within the discretion of the court.<sup>55</sup> But it should not be granted where the action is for the price of goods sold, on the ground that a third person claimed to be the owner of the goods,<sup>56</sup> even though such third person claimed that the goods had been procured from him by fraud.<sup>57</sup> But where defendant alleged that he had been sued by a third person, claiming that the plaintiff sold the goods as his agent, whereas the plaintiff claimed that he sold them in his own right, it was held a proper case to order that defendant be discharged on paying the money into court, and that such third person be substituted as defendant.<sup>58</sup>

<sup>54</sup> Cal. Code Civ. Pro., § 386; N. Y. Code, § 820.

<sup>55</sup> *Barry v. Mutual Life Ins. Co. of N. Y.*, 53 N. Y. 536.

<sup>56</sup> *Sherman v. Partridge*, 4 Duer, 646.

<sup>57</sup> *Trigg v. Hitz*, 17 Abb. Pr. 436.

<sup>58</sup> *Johnston v. Lewis*, 4 Abb. Pr. (N. S.) 150. An interpleader will be sustained whenever it is necessary for the protection of a person, from whom several others claim legally or equitably the same thing, debt, or duty, but who has incurred no independent liability to any of them, and does not himself claim an interest in the matter. He must occupy the place of a mere stakeholder. *Pfister v. Wade*, 56 Cal. 43; *Pope v. Ames*, 20 Oreg. 199; *De Zouche v. Garrison*, 140 Penn. St. 430; *Clark v. Mosher*, 107 N. Y. 118; 1 Am. St. Rep. 798; *Baltimore, etc., R. R. Co. v. Arthur*, 90 N. Y. 234. It seems, that the material allegations in a complaint in an action of interpleader are, that two or more persons have preferred a claim against the plaintiff; that they claim the same thing; that the plaintiff has no beneficial interest in the thing claimed; and, that he can not determine without hazard to himself to which of the defendants the thing belongs. *Crane v. McDonald*, 118 N. Y. 648; and see *Dorn v. Fox*, 61 id. 268; *Stone v. Reed*, 152 Mass. 179; *North Pacific Lumber Co. v. Lang*, 28 Oreg. 246.

**§ 4526. Affidavit in action to recover money.**

*Form No. 1110.*

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. That he is the defendant in the above-entitled action.

II. That the said action has been commenced and is now pending in this court, against the above-named defendant, on a contract; and that the said defendant has not yet answered therein, and his time to do so does not expire until the ..... day of ....., 18.., next.

III. That said action is brought to recover the sum of ..... dollars, deposited with said defendant on or about the ..... day of ....., 18.., by one A. B.; and that the plaintiff claims to be entitled to said moneys so deposited, under an assignment thereof to him by the said A. B.

IV. That on the ..... day of ....., 18.., one M. N. gave to said defendant notice that the said moneys had been assigned to him by A. B., and demanded of said defendant that he pay the said deposit to him; which demand was made without any collusion with the defendant. And this deponent further says that he is not acquainted with the respective merits of said claims, and does not know to which of said parties he can safely pay said money; but hereby offers to pay the same into court, upon being discharged from liability to either of them, in order that said several claimants may interplead, and settle their claims between themselves.

[JURAT.]

[SIGNATURE.]

**§ 4527. Affidavit where action is brought to recover specific personal property.**

*Form No. 1111.*

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. That he is the defendant in the above-entitled action.

II. That the complaint therein was served on him on the ..... day of ....., 18.., at ....., and no answer has yet been filed.

III. That the property which is claimed by the plaintiff herein was delivered to this deponent for storage by one O. P., of ....., subject to his order.

IV. That the same property is claimed by one Q. R., of ..... , under a written order of the said O. P., dated on the ..... day of ..... , 18.., and directing its delivery to him as the alleged purchaser thereof; while the plaintiff herein claims under a general assignment of all the property of the said O. P. to him, executed by the said O. P. on the same day.

V. That the defendant is ignorant of the rights of the respective claimants, and is not acting in collusion with either of them.

VI. That the defendant is ready and willing to deliver the said property to such person as the court may direct, upon being discharged from liability to either of the said claimants.

[JURAT.]

[SIGNATURE.]

**§ 4528. Notice of motion to allow party to interplead.**

*Form No. 1112.*

[TITLE.]

Take notice that on the affidavit herewith served, and on the complaint herein, the defendant will move the court, at the courtroom thereof, at ..... on the ..... day of ..... , 18.., at ..... o'clock in the ..... noon, or as soon thereafter as counsel can be heard, to substitute M. N., of ..... , in his place, as defendant herein, and to discharge this defendant from liability to either the plaintiff or the said M. N., concerning [designate the contract], mentioned in the complaint, upon this defendant's paying into court the sum of ..... dollars, the amount claimed in the summons herein [or if the action is for specific property, say, concerning the property mentioned in the complaint, upon said defendant's transferring the same to such person as the court may direct]; or for such other relief as may be just.

[DATE.]

[SIGNATURE.]

**§ 4529. Order of interpleader.**

*Form No. 1113.*

On reading and filing the affidavit of C. D., and upon proof of due service of notice of this motion, and on motion of G. H., for C. D., and after hearing E. F. in opposition:

It is ordered that on payment by the defendant to the clerk of the county of ..... of the amount claimed in the summons herein, principal and interest, within five days from the date of this order, Q. R. be substituted as defendant in this

action in place of C. D., the defendant above named, and that said C. D. thereupon be discharged from liability to either the plaintiff above named or said Q. R. And it is further ordered that if the said Q. R. does not appear and defend this action within ..... days after service upon him of a copy of this order, together with a copy of the summons and complaint herein, the plaintiff may apply for an order that the money so deposited be paid over to him.

**§ 4530. Petition by landlord to be made defendant in action of ejectment.**

*Form No. 1114.*

[TITLE.]

The petition of M. N. respectfully shows to this court:

I. That an action is now pending in this court by A. B., plaintiff, against C. D., defendant, for the recovery of the possession of certain real property, situated in the county of ....., and more particularly described in the complaint in said action; which action your petitioner is informed and believes is at issue and upon the calendar of this court, awaiting trial.

II. That said C. D. occupies said premises as tenant of your petitioner, and not otherwise. That your petitioner claims in good faith to be the owner in fee simple of said premises [here briefly indicate title].

Wherefore your petitioner prays that he may be made a party defendant in said action, and may be allowed to defend the same, and that he may have such other relief as may be just.<sup>59</sup>

[DATE.]

[SIGNATURE.]

[Verification.]

<sup>59</sup> Where a tenant finds that there are claimants to the property, he should file a bill of interpleader, making all the adverse claimants parties thereto, and offer to pay the rents into court to abide the ultimate decision of the case. *McDevitt v. Sullivan*, 8 Cal. 592; *McCoy v. Bateman*, 8 Nev. 126. In an action to determine the title or right of possession to real property, which at the time of the commencement of the action is in the possession of a tenant, the landlord may be joined as a party defendant. Cal. Code Civ. Pro., § 379. A tenant against whom conflicting claims for rent are made may file a bill of interpleader against the several claimants to determine their respective rights to the rent, and in such action the court may determine the rights of the claimants as between themselves. *Schluter v. Harvey*, 65 Cal. 158; and see *Ketcham v. Coal Co.*, 88 Ind. 515.

**§ 4531. Notice of motion to make party defendant.**

*Form No. 1115.*

[TITLE.]

[ADDRESS.]

Please take notice that on the annexed petition, and on the papers on file in this action, the undersigned will move the court, at the courtroom thereof, at . . . . ., on the . . . . . day of . . . . ., 18.., at . . . . . o'clock in the . . . . . noon, or as soon thereafter as counsel can be heard, for an order directing M. N., the petitioner above named, to be made a party defendant in the action now pending in this court between A. B., plaintiff, and C. D., defendant, and for such other relief as may be just.

[DATE.]

[SIGNATURE.]

**§ 4532. Order making third person a party defendant.**

*Form No. 1116.*

[TITLE.]

On reading and filing the petition [or affidavit] of S. T., dated the . . . . . day of . . . . ., 18.., and proof of due service of notice of this motion, and on motion of E. F. for said S. T., and after hearing G. H. in opposition.

It is ordered that S. T. be made a party defendant in said action, and that the summons and complaint be amended accordingly; and that S. T. cause notice of appearance for himself herein to be given to plaintiff's attorney within . . . . . days from the entry of this order, and a copy of the complaint as amended served upon his attorney, and that the cause thereupon proceed as if said S. T. had been originally a party defendant therein.



## CHAPTER VII.

### SUPPLEMENTAL PLEADINGS.

**§ 4533. In general.** In California, the plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer.<sup>1</sup> The New York Code<sup>2</sup> permits also a statement of facts in a supplemental pleading, of which the party was ignorant at the time the original pleading was made. Facts, however, which existed at the commencement of the action, but which were then unknown to the pleader, but afterwards came to his knowledge, were always proper to be alleged in an amended pleading. The above section of the New York Code also includes among the matters which may be alleged in a supplemental pleading "the judgment or decree of a competent court, rendered after the commencement of the action, determining the matters in controversy, or a part thereof." Such matters could doubtless be pleaded under the comprehensive language of the California Code. In New York the party may have leave to make the supplemental pleading either in addition to his former pleading or in place of it. In New York<sup>3</sup> it was held that supplemental pleading was not a right, but depended upon the discretion of the court. By the amendment of 1877, the words "and in a proper case must" were inserted in section 544 after the words "the court may." In California, though the right may rest in the discretion of the court, and an order granting or refusing leave to file is not appealable, yet it is an "intermediate order," which may be reviewed on appeal.<sup>4</sup> At common law the right of the defendant to avail himself of matters of defense, arising after the commencement of the suit, was as ample, perhaps, as

<sup>1</sup> Cal. Code Civ. Pro., § 464. Facts occurring subsequent to the commencement of an action should be presented by supplemental pleadings, and not by amendment to the original proceedings. *Sylvester v. Jerome*, 19 Cal. 128.

<sup>2</sup> Cal. Code Civ. Pro., § 544 (1877).

<sup>3</sup> *Medbury v. Swan*, 46 N. Y. 200; *Holyoke v. Adams*, 59 id. 233.

<sup>4</sup> Cal. Code Civ. Pro., § 956.

under the Code. But the plaintiff had no corresponding right. In courts of equity, however, the plaintiff could avail himself of matters arising after the filing of the bill by a supplemental bill;<sup>5</sup> at law, matters of defense arising after the commencement of the suit, but before plea or continuance was pleaded, not in bar of the suit generally, but to the further maintenance of the suit. If the matter of defense arose after plea pleaded or issue joined, it was then *puis darrein continuance*.<sup>6</sup> Such plea is always pleaded by way of substitution for the former plea, on which no proceeding is afterwards had, and may be either in bar of the further prosecution of the suit or in abatement.<sup>7</sup> Whether the former answer is wholly superseded by a supplemental one must depend on its form and the circumstances of the case, since inconsistent defenses may be pleaded under the Code.

§ 4534. Notice of motion for leave to file supplemental complaint.

*Form No. 1117.*

[TITLE.]

[ADDRESS.]

Please take notice that upon the affidavit and copy of supplemental complaint herewith served, and upon all the proceedings on file in this action, the undersigned will move the court, at the courtroom thereof, at . . . . ., on the . . . . . day of . . . . ., 18.., at the hour of . . . . . o'clock in the . . . . .noon, or as soon thereafter as counsel can be heard, for leave to file and serve such supplemental complaint in this action, and for such other relief as may be just.

[DATE.]

[SIGNATURE.]<sup>8</sup>

§ 4535. Effect of supplemental pleading. The Legislature, in allowing supplemental complaints and answers, intended to follow the former chancery rule, and thus chose terms which import something additional or amendatory to what has gone before.<sup>9</sup> It is, therefore, not allowable to a defendant, as a general rule, without special permission, to answer anew, or

<sup>5</sup> See Story's Eq. Pl., chap. 8.

<sup>6</sup> 1 Chit. Pl. 689.

<sup>7</sup> Stephen's Pl. 98.

<sup>8</sup> For the rules as to forms and sufficiency of supplemental bills, see *Chouteau v. Rice*, 1 Minn. 106.

<sup>9</sup> See *Slauson v. Englehart*, 34 Barb. 198; *De Lisle v. Hunt*, 36 Hun, 620; *Hall v. Olney*, 65 Barb. 27; *McCaslan v. Latimer*, 17 S. O. 305.

further the original complaint.<sup>10</sup> Leave to file the supplemental complaint does not establish the plaintiff's right to sue for the original cause of action, and decides nothing as to the plaintiff's rights.<sup>11</sup> A new cause of action can not be set up by supplemental complaint. Matter must be consistent with and in aid of original proceeding.<sup>12</sup> Nor can the nature of the plaintiff's claim be changed,<sup>13</sup> or the rights of a substitute defendant enlarged, so as to enable him to traverse a fact submitted by his predecessor.<sup>14</sup>

**§ 4535a. Supplemental complaint—leave to file.** A supplemental complaint is not an amendment to a pleading, and is only authorized for the purpose of bringing before the court facts material to the case occurring after the former complaint or answer, and leaves the former pleading intact, while an amendment to a pleading makes a substituted pleading.<sup>15</sup> As a general rule, the right to file a supplemental complaint can be exercised only with reference to matters which may be consistent with and in aid of the case made by the original complaint, and it is not allowable to substitute a new and independent cause of action.<sup>16</sup> And where no facts material to the case occurring after the former complaint are alleged in the supplemental complaint, a demurrer to it is properly sustained.<sup>17</sup> Permission to file a supplemental complaint is in the discretion of the court, this discretion being so limited as not to allow the substitution of a new and independent cause of action. But it is no objection to a supplemental complaint that different or additional relief is asked.<sup>18</sup> An order refusing leave to file a supplemental complaint is not an order deemed excepted to under California Code of Civil Procedure, section 647, and such order can not be re-

<sup>10</sup> *Dann v. Baker*, 12 How. Pr. 521.

<sup>11</sup> *Robbins v. Wells*, 26 How. Pr. 15.

<sup>12</sup> *Wattson v. Thibou*, 17 Abb. Pr. 184; *Cordier v. Cordier*, 26 How. Pr. 187; *Holly v. Graf*, 29 Hun, 443.

<sup>13</sup> *Cheeseman v. Sturges*, 19 Abb. Pr. 293.

<sup>14</sup> *Forbes v. Waller*, 25 N. Y. 430.

<sup>15</sup> *Giddings v. Land & Water Co.*, 109 Cal. 116. A motion for leave to serve both an amended and supplemental complaint can not be granted. *Oelberman v. Railroad Co.*, 31 Abb. N. C. 258.

<sup>16</sup> *Gleason v. Gleason*, 54 Cal. 135; *Gordon v. San Diego*, 103 id. 284.

<sup>17</sup> *Baker v. Brickell*, 102 Cal. 620.

<sup>18</sup> *Jacob v. Lorenz*, 98 Cal. 332; see *McLennan v. Ohmen*, 73 id. 558; *Latham v. Richards*, 15 Hun, 131.

viewed upon appeal from the judgment without being incorporated in a bill of exceptions.<sup>19</sup> In an action for divorce on the ground of cruelty, other acts of cruelty occurring subsequently to the commencement of the action, were allowed to be set up by supplemental complaint.<sup>20</sup> But it is held that leave to serve a supplemental complaint in an action for divorce setting up additional acts of adultery since the commencement of the action and joining of issue, can not be granted.<sup>21</sup>

§ 4536. **Fraud, as ground for.** The discovery of fraud after filing the original bill against the assignee of a debtor may be added to the original bill by a supplemental complaint, without bringing in all the other creditors.<sup>22</sup> Where a simple contract creditor filed a bill against the assignee of his debtor, not attacking the assignment, and merely praying for a distribution, and the plaintiff subsequently filed a supplemental bill, setting forth that in the meantime he had become a judgment creditor, and attacking the assignment for fraud, since discovered, and praying that it be set aside, and that the moneys in the hands of the assignee be appropriated to plaintiff's judgment, it was held that it is no objection to the supplemental bill that it prays for a different relief, and fails to bring in all the other creditors who are alleged by the defense to be entitled to a ratable distribution.<sup>23</sup> The *gravamen* of both bills is the indebtedness, and every supplemental bill is enlarged or altered by every additional and pertinent fact, and the plaintiff has the right to attack the assignment for fraud discovered since filing his original bill.<sup>24</sup> Material facts which existed at the commencement of the ac-

<sup>19</sup> *Giddings v. Land & Water Co.*, 109 Cal. 116.

<sup>20</sup> *Scoland v. Scoland*, 4 Wash. St. 118.

<sup>21</sup> *Neiberg v. Neiberg*, 31 Abb. N. C. 257; *Halsted v. Halsted*, 26 N. Y. Supp. 758; but compare *Blanc v. Blanc*, 67 Hun, 384; *Kirsch v. Kirsch*, 83 Cal. 633. Allowance to file supplemental complaint — not deemed prejudicial. See *McLennan v. Ohmen*, 75 Cal. 558; permission to file in action of ejectment, see *Belles v. Miller*, 10 Wash. St. 259; insufficiency of supplemental complaint, see *Davis v. Erickson*, 3 id. 654; denial of permission to file in action of claim and delivery, see *Paulson v. Nunan*, 72 Cal. 243. In an action for libel, the plaintiff was permitted to file a supplemental complaint setting up a publication of the libel after the commencement of the action. *Corbin v. Knapp*, 5 Hun, 197.

<sup>22</sup> *Truebody v. Jacobson*, 2 Cal. 269; *Baker v. Bartol*, 6 id. 483; *Mattoon v. Eder*, id. 61; *Davis v. Robinson*, 10 id. 412.

<sup>23</sup> *Baker v. Bartol*, 6 Cal. 483.

<sup>24</sup> *Id.*

tion, but were not known or discovered by the party until after his complaint or answer was filed, are proper to be alleged in an amended pleading, but not in a supplemental pleading in California. It is otherwise in New York.<sup>25</sup>

**§§ 4537. Motion, when may be made.** Circumstances occurring subsequently to filing an answer, materially affecting the rights of the respective parties, to the advantage of the defendant, should be embodied in a supplemental answer to authorize evidence of them without the plaintiff's consent.<sup>26</sup> Such facts can not be incorporated with the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action.<sup>27</sup> So when a female subsequently marries, her husband must be joined with her, and this should be done, and an averment of the marriage should be made, by supplemental pleading, and not by amendment to the original.<sup>28</sup> In New York it was held that the filing of a supplemental complaint against the executor of a deceased defendant is a matter of right, and that leave of the court need not and ought not to be obtained, though more than a year has elapsed.<sup>29</sup> Leave, however, was refused by a General Term of the Superior Court, in a case where the original complaint was fatally defective.<sup>30</sup> Neither a purchaser at sheriff's sale, as such, nor a redemptioner, either before or after redemption, nor an assignee of the sheriff's certificate of sale, upon his own *ex parte* motion made in his own name, is entitled to have the judgment upon which the execution or order of sale issued, vacated, and himself substituted as plaintiff, in order that he may file a supplemental complaint to bring in other parties.<sup>31</sup>

**§ 4538. May be amended.** A supplemental complaint may be once amended of course, and a new cause of action set up by the amendment.<sup>32</sup>

<sup>25</sup> See N. Y. Code, § 544 (1877).

<sup>26</sup> Van Maren v. Johnson, 15 Cal. 308; Moss v. Shear, 30 id. 472; 1 Van Santv. Pl. 378; 2 Barb. Ch. Pr. 635; Stafford v. Howlett, 1 Paige Ch. 200; Hornfager v. Hornfager, 1 Code R. (N. S.) 180.

<sup>27</sup> Van Maren v. Johnson, 15 Cal. 308.

<sup>28</sup> Van Maren v. Johnson, 15 Cal. 311.

<sup>29</sup> Bornsdorff v. Lord, In re, 41 Barb. 211; S. C., 17 Abb. Pr. 168; Roach v. La Farge, 43 Barb. 616; S. C., 19 Abb. Pr. 67; see Spears v. Mayor, etc., 72 N. Y. 442; McDonald v. Davis, 12 Hun, 95.

<sup>30</sup> Robbins v. Wells, 26 How. Pr. 15; S. C., 18 Abb. Pr. 191.

<sup>31</sup> Abadie v. Lobero, 36 Cal. 390.

<sup>32</sup> Divine v. Duncan, 52 How. Pr. 446.

**§ 4539. Affidavit on motion to file supplemental complaint.**  
*Form No. 1118.*

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. That he is the plaintiff in the above-entitled action; that said action was commenced in this court on the ..... day of ..... 18.., by the filing of the complaint with the clerk of this court, and the issuing of a summons thereon; that thereafter on the ..... day of ..... 18.., a copy of the summons, and copy of the complaint therein, was served upon the defendant.

II. That the action is brought for the purpose of [state the object of action].

III. That issue has been joined therein, and the cause is now upon the calendar of this court for trial.

IV. That he has read the annexed proposed supplemental complaint, and that the facts therein stated are true, of his own knowledge.

V. That said facts did not come to the knowledge of this deponent, nor had he any information thereof, until after the service of the original complaint herein, to-wit, on or about the ..... day of ..... 18...

[JURAT.]

[SIGNATURE.]<sup>23</sup>

**§ 4540. Order granting leave to file supplemental complaint.**  
*Form No. 1119.*

[TITLE.]

On reading and filing [designate motion papers], and on motion of E. F., attorney for the plaintiff, and after hearing G. H., attorney for the defendant:

It is ordered that the plaintiff have leave to serve on defendant, within ..... days after this date, a copy of the supplemental complaint filed upon this motion [on payment of ..... dollars costs to the defendant].

[DATE.]

[SIGNATURE.]

<sup>23</sup> If the motion has not been noticed for hearing promptly upon the discovery of the facts, the affidavit should excuse the delay by showing why it was not made sooner. If it appear that the adverse party has not been prejudiced by the delay, the motion should be granted, though the excuse be not satisfactory, upon the principle that the neglect of any party, if not wholly unreasonable, should not deprive him of a legal right unless injustice to the other party would be the result.

**§ 4541. Affidavit on motion to file supplemental answer.**

*Form No. 1120.*

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. That he is the defendant in the above-entitled action.

II. That said action was commenced on the ..... day of ....., 18..., that issue was joined therein by the serving and filing of this defendant's answer, on the ..... day of ....., 18..., and this cause is now upon the trial calendar of this court.

III. And this deponent further says that this action is brought [here state purpose of suit]; that since the joining of the issue, to-wit, on the ..... day of ....., 18..., this defendant paid to the plaintiff the sum of ..... dollars, in full payment of the note mentioned in the complaint, and of the costs up to that day, accrued herein.

[JURAT.]

[SIGNATURE.]

**§ 4542. Order granting leave to file supplemental answer.**

*Form No. 1121.*

[TITLE.]

On reading and filing [designate motion papers], and on motion of G. H., attorney for defendant, and no one appearing in opposition:

It is ordered that the defendant be allowed to file a supplemental answer herein, setting up [state nature of defense], such answer to be served upon the attorney for the plaintiff, within ..... days from the entry of this order.

[DATE.]

[SIGNATURE.]<sup>34</sup>

**§ 4543. After reversal.** Where the Circuit Court, after a reversal of their decree, further proceedings being awarded, al-

<sup>34</sup> Though not essential, it is the better practice to prepare and present the supplemental answer to the court on the hearing of the motion, and to serve a copy of the same with the notice of motion. Insufficient affidavit. See *Pollard v. Lathrop*, 12 Col. 171. A supplemental answer, although presented to the clerk for filing and marked as filed, does not become a pleading so as to constitute part of the judgment-roll, until an order permitting it to be filed has been obtained. *Wood v. Brush*, 72 Cal. 224. The failure of the defendant to appear upon the hearing of his motion for leave to file a supplemental answer will be considered an abandonment of the motion. *Id.*

lowed a supplemental answer, to bring before the court the facts which were proper to be known before instructions were given to a master as to the mode of settling the accounts, it was held that under the circumstances this was proper, and no objection could be taken to it on a subsequent appeal.<sup>35</sup>

§ 4544. **Discharge.** Evidence of the discharge of the debt sued on, by transactions subsequent to the filing of the answer, is admissible only under the plea of payment *puis darrein continuance*.<sup>36</sup>

§ 4545. **Foreclosure.** A supplemental answer to a bill of foreclosure should embrace new matter discovered subsequent to the filing of the original answer. But this is a matter of discretion with the court, who will not enforce the rule so as to work injustice.<sup>37</sup>

§ 4546. **Judgment.** Where, after answer has been served, setting up the pendency of another action, judgment has been rendered therein, the proper course to make evidence of such judgment admissible is to obtain leave to serve a supplemental answer alleging the fact.<sup>38</sup>

§ 4547. **Parties.** The objection, if it be one, that there is a misjoinder of parties plaintiff, owing to the matters which have occurred pending the action, must be taken by a supplemental answer, or it is waived.<sup>39</sup>

§ 4548. **Title acquired.** If the defendant in an action to recover possession of real estate has acquired title to the demanded premises pending the litigation, evidence of this fact can not be introduced, unless it is pleaded as a defense in a supplemental answer.<sup>40</sup> In actions to recover lands, title acquired by defendants *pendente lite*, and other matters of defense arising subsequent to the commencement of the suit, must be set up by a supplemental answer in the nature of a plea *puis darrein continuance*.<sup>41</sup>

<sup>35</sup> Williams v. Gibbs, 20 How. (U. S.) 535.

<sup>36</sup> Jessup v. King, 4 Cal. 331.

<sup>37</sup> Suydam v. Truesdale, 6 McLean, 459; see Bewick v. Muir, 83 Cal. 373.

<sup>38</sup> N. Y. Code (1877), § 544; Drought v. Curtis, 8 How. Pr. 56.

<sup>39</sup> Calderwood v. Peyser, 31 Cal. 333.

<sup>40</sup> McMinn v. O'Connor, 27 Cal. 246.

<sup>41</sup> Moss v. Shear, 30 Cal. 468.



§ 4549 **Title of plaintiff terminated.** The defendant can not prove, on the trial of an action of ejectment, for the purpose of showing that plaintiff's right of possession has terminated, that since the action was commenced plaintiff has conveyed the land to another person, unless the fact of such conveyance has been set up in the original or a supplemental answer.<sup>42</sup>

§ 4550. **When allowed.** Where a defendant has answered generally to a matter of which he has no particular knowledge, he may be allowed to file a supplemental answer on the same subject after he has acquired particular information concerning it, and to introduce into such answer new matter which has come to his knowledge since filing the original answer, on furnishing the opposite party with the names of the witnesses by whom he expects to prove it.<sup>43</sup> Leave will not be given to set up by supplemental answer matter not constituting a defense.<sup>44</sup> And the answer proposed must be true, and must contain a good defense, or leave will be refused; and its truth may be inquired into on motion.<sup>45</sup> Leave should be obtained by motion, on affidavit and notice, before trial.<sup>46</sup> Fifteen months' delay is a good ground for refusing leave to set up a discharge in bankruptcy.<sup>47</sup> But leave was allowed nine months after judgment by default where the attorney's misapprehension caused the delay.<sup>48</sup> Where new facts amount to entire satisfaction, it is the duty of the court to allow the motion without reference to the question of laches.<sup>49</sup>

<sup>42</sup> *Moss v. Shear*, 30 Cal. 468; *McMinn v. O'Connor*, 27 id. 246.

<sup>43</sup> *Caster v. Wood*, 1 Baldw. 289.

<sup>44</sup> *Betz v. Betz*, 19 Abb. Pr. 90.

<sup>45</sup> *Morel v. Garely*, 16 Abb. Pr. 269.

<sup>46</sup> *Garner v. Hannah*, 6 Duer, 262; see *Lyon v. Isett*, 11 Abb. Pr. (N. S.) 353; *Hopkins v. Mason*, 42 How. Pr. 155.

<sup>47</sup> *Medbury v. Swan*, 46 N. Y. 200.

<sup>48</sup> *Hadley v. Boehm*, 1 Hun, 304.

<sup>49</sup> *Drought v. Curtiss*, 8 How. Pr. 56.

## CHAPTER VIII.

### SUBSEQUENT PLEADINGS.

§ 4551. **Cross-complaint.** Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or, by permission of the court, subsequently, a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto, as to the original complaint.<sup>1</sup> The line of distinction between cross-complaints and counterclaims is not very clear. New matter, if it constitutes a defense or counterclaim, may be pleaded in an answer, though the counterclaim must be distinct from the answer, and show a cause of action against the plaintiff.<sup>2</sup> Under subdivision 2 of section 438, California Code of Civil Procedure, in an action arising upon contract, the counterclaim may be any other cause of action arising upon contract, and existing at the commencement of the action. This subdivision is wholly distinct from a cross-complaint. The first subdivision of section 438, however, seems to be very nearly allied to section 442, relating to cross-complaints. Under subdivision 1 of section 438, the counterclaim may be "a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action." The distinction between counterclaims and cross-complaints would be of little importance, were it not for the fact that no answer or replication is required to a counterclaim, while a cross-complaint must be answered.

Section 442, California Code of Civil Procedure, was not embraced in the Practice Act, which preceded it, but which permitted the subject-matter of a cross-complaint which might

<sup>1</sup> Cal. Code Civ. Pro., § 442; see § 3370, *ante*; Harrison v. McCormick, 69 Cal. 616; Boland v. Ross, 120 Mo. 208; Pool v. Davis, 135 Ind. 323; Hill v. Frink, 11 Wash. St. 562; Hughes v. Boone, 81 N. C. 204.

<sup>2</sup> Quinn v. Smith, 49 Cal. 165.

entitle a defendant to relief against the plaintiff alone, or against the plaintiff and a codefendant, to be set up in the answer.<sup>3</sup> Such matter in an answer required a reply, or the same was deemed admitted.<sup>4</sup> So far as known, in the California practice, prior to the adoption of the Code, cross-complaints, as such, were permitted, in analogy to the former cross-bill in chancery; nor does this provision of the Code materially change or enlarge the right or remedy of the defendant, except that it may be invoked in a case where the plaintiff's cause of action is at law, as well as where it is in equity, and this as well by virtue of the general provision abolishing the distinctions between actions at law and suits in equity, as by force of the section under consideration. This section is, therefore, mainly useful in giving a name to this particular pleading, and prescribing the time and manner of pleading it, and for the underlying principles we must look to the former practice at law and in equity. Under the former practice, a defendant in chancery could not pray anything in his answer, except to be dismissed from the court; and hence, if he wished to pray any relief, or if he sought a discovery, he was compelled to file a bill of his own, entitled a cross-bill.<sup>5</sup> It would only lie touching the matters in the original bill;<sup>6</sup> and whenever it is brought against codefendants in a suit, the complainant must be named a defendant together with them.<sup>7</sup> A cross-bill is generally considered as a defense, and the original cause and the cross-bill are but one cause. It is so effectual as a defense, that if a cross-bill is taken as confessed, it may be used as evidence against the complainant in the original suit on the hearing, and will have the same effect as if he had admitted the facts in an answer.<sup>8</sup>

Strictly speaking, a set-off or counterclaim is not a defense. It does not go to defeat the plaintiff's cause of action, but when allowed, the counterclaim or set-off becomes an equitable payment, and the opposing claims, so far as they equal each other, are deemed satisfied, and but one judgment is rendered, that being for the difference in amounts, and in favor of the party

<sup>3</sup> Laws of 1865-6, p. 702, § 2, amending § 46 of the Practice Act.

<sup>4</sup> Herold v. Smith, 34 Cal. 124.

<sup>5</sup> Barb. Ch. Pr., book 4, p. 126.

<sup>6</sup> Mitf. Eq. Pl. 81.

<sup>7</sup> Cooper's Eq. Pl. 85; Barb. Ch. Pr., *supra*.

<sup>8</sup> White v. Buloid, 2 Palge Ch. 164. As to the cases in which a cross-bill will lie, consult the authorities collated in 2 Barb. Ch. Pr., 2d rev. ed., 482.

entitled thereto, whether plaintiff or defendant. If such balance is in favor of the defendant, or, indeed, if his counterclaim be allowed, whether greater than the plaintiff's claim or not, the relief he obtains is affirmative, though in a substantial rather than in a technical sense. The same result is reached as though separate actions had been prosecuted to final judgment, and the judgments were set off against each other.

**§ 4552. Distinctions between counterclaim and cross-complaint.** There are, however, some distinguishing features between counterclaims arising under subdivision 1 of section 438, and cross-complaints under section 442 of the California Code of Civil Procedure: 1. When the defendant's claim, if allowed, is against the plaintiff, and goes in reduction or discharge of the plaintiff's demand, or results in a simple money judgment against the plaintiff, it is properly the subject of a counterclaim and not of a cross-complaint. 2. If the relief sought by a defendant be against other defendants, who are proper parties to a full and final determination of the matters alleged in the complaint, or against the plaintiff and one or more of the defendants, it must be by cross-complaint. 3. Though the relief sought by defendant be against the plaintiff alone, yet if that relief can not result directly in a simple money judgment, which may be applied in reduction or extinguishment of the plaintiff's claim or demand, but in other affirmative relief, as an injunction, unless the defendant's right thereto appears from the complaint,<sup>9</sup> or the cancellation of an agreement in an action to enforce specific performance,<sup>10</sup> or for the purpose, in some cases, of obtaining an equitable set-off,<sup>11</sup> and generally, where the defendant is entitled to some positive relief, beyond what the complainant's bill will afford him,<sup>12</sup> a cross-complaint must be filed. So, also, a cross-complaint will lie against a plaintiff for a money demand, where the plaintiff seeks other and different relief concerning the subject of the action; as where the maker of a note brings an action to cancel it, on any grounds entitling him to such relief, the payee or indorsee may, in addition to his answer, file a cross-complaint, and recover a judgment against the plaintiff upon the note. In such case it is

<sup>9</sup> *Thursby v. Mills*, 1 Code R. 83.

<sup>10</sup> *McCrackan v. Ware*, 3 Sandf. 688.

<sup>11</sup> *Cartwright v. Clark*, 4 Met. 104.

<sup>12</sup> *Schwarz v. Sears*, Walk. Ch. 170.

evident that if separate actions had been brought, several judgments in favor of the respective plaintiffs could not have been rendered; nor could such several judgments be offset against each other if it were possible to obtain them.

In New York, cross-complaints are not provided for by any enactment of the Code. It neither authorizes nor prohibits them. A defendant, however, may have affirmative relief against the plaintiff alone if he claim it by his answer.<sup>13</sup> But where a defendant is entitled to relief against the plaintiff and other defendants, or against other defendants, a cross-complaint or cross-suit is necessary.<sup>14</sup> In Ohio, cross-complaints (petitions) are permitted, under section 84 of the Code; but a formal pleading seems not to be necessary. The defendant may claim such relief in his answer, and if, on inspection of the answer, it shall be found to contain a prayer for judgment, and the necessary averments to show the defendant's right to relief under the proceedings instituted against him, the court will not require the filing of a cross-petition in form, but will treat such answer as equivalent to a petition of that kind, and grant whatever relief the party may show himself entitled to receive.<sup>15</sup> In the United States courts, the filing of a cross-bill without the leave of the court is an irregularity, and the same may be properly set aside.<sup>16</sup>

**§ 4553. Nature of relief.** The relief sought by a cross-complaint, under section 442, California Code of Civil Procedure, must be affirmative, and must relate to or depend upon the contract or transaction upon which the action is brought, or affect the property to which the action relates. The language of this section is broader than subdivision 1 of section 438. Under that section, in an action to quiet title to lands, the cause of action stated in the complaint was that the defendant claimed some estate or interest in the premises, of which the plaintiff averred himself to be in possession. Defendant's an-

<sup>13</sup> Van Santv. Eq. Pr. 266.

<sup>14</sup> Id. 224; Thursby v. Mills, 1 Code R. 83; Tracy v. New York Steam Faucet Co., 1 E. D. Smith, 349; McCrackan v. Ware, 3 Sandf. 688.

<sup>15</sup> Klonne v. Bradstreet, 7 Ohio St. 322. See, also, upon the subject of cross-complaints, Code of Oregon, § 71; Hill's Ann. Laws of Oregon (1892), § 361; Arizona, § 46; Wash. Ter., § 58; Idaho Rev. Stat. (1887), § 4198; Lyman v. Stanton, 40 Kan. 727; Gregory v. Bovier, 77 Cal. 121.

<sup>16</sup> Bronson v. La Crosse R. R. Co., 2 Wall. 283.

swer stated facts essential to a complaint in ejectment against the plaintiff, and demanded possession. Plaintiff, when the cause was called for trial, moved to dismiss the action, which was opposed upon the ground that the answer contained a counterclaim. The Supreme Court held, upon appeal from the order refusing to dismiss the action, that the "subject of the action" was the adverse claim or interest set up by the defendants, and that the answer contained neither a statement of a cause of action arising out of the transaction set forth in the complaint, nor one connected with the subject of the action, in the sense of the statute.<sup>17</sup> This question arose under the first subdivision of section 581 (prior to the amendment of 1878), which provides that the plaintiff may dismiss the action at any time before trial, upon the payment of costs, if a counterclaim has not been made; but it serves to point a distinction between the words "the subject of the action," in section 438, and the words "or affecting the property to which the action relates," in section 442.<sup>18</sup> In special cases, it may require consideration to determine correctly whether a counterclaim or a cross-complaint should be interposed. While the Code permits a defendant to plead as many defenses as he may have, even though they are not consistent, it was certainly not the intention that the same matter should be pleaded in several different ways, all tending to the same result. It may occur, however, that facts pleaded in an answer are necessary to be repeated in a counterclaim or cross-complaint, in order to the statement of the cause of action in such counterclaim or cross-complaint; but the same matter or cause of action should not be pleaded both as a counterclaim and a cross-complaint. In New York it has been held that if a defendant sets up a counterclaim in his answer, and also files a cross-complaint for the same cause of action, he may be compelled, on motion, to elect on which he will rely.<sup>19</sup> Or a reference may be ordered to ascertain whether the cross-complaint is for the same cause as the counterclaim; and if the report is in the affirmative, the plaintiff may have an order dismissing the cross-action.<sup>20</sup>

<sup>17</sup> *Moyle v. Porter*, 51 Cal. 639.

<sup>18</sup> See, also, *James v. Center*, 53 Cal. 31, where it was held that judgment of dismissal might be entered, notwithstanding cross-complaint filed by defendant.

<sup>19</sup> *Fabricotti v. Launitz*, 1 Code R. (N. S.) 121; *Hammond v. Baker*, *id.* 105.

<sup>20</sup> *Farmers' Loan & Trust Co. v. Hunt*, 1 Code R. (N. S.) 1.

§ 4554. **Averments.** A cross-complaint must state all the facts which would be required in an original complaint, to entitle the party pleading it to affirmative relief, and it can not be aided by the averment of any other pleading in the action.<sup>21</sup> To entitle the defendant to set up a claim to relief, by way of cross-petition, it is not necessary that the answer should contain a denial of the allegations of the petition, or that the answer should contain any statement of new matter.<sup>22</sup>

§ 4555. **Form and mode of pleading.** Under the Ohio practice, the cross-petition is or may be contained in the answer, and it would seem without any formal designation of it as such.<sup>23</sup> In California the usual practice is, at the conclusion of the matter pleaded by way of answer, to state, "And the defendant, A. B., by way of cross-complaint, against the plaintiff, alleges," etc., the signature of the attorneys and verification following at the end of the whole pleading. In such case the verification should be that "he has read the foregoing answer and cross-complaint, and that the same and each of them are true," etc. The better mode of pleading is to conclude and verify the answer, and prepare the cross-complaint as a separate pleading. If the cross-complaint seeks relief against codefendants alone, or against the plaintiff and one or more defendants, it is eminently proper that it should be a separate pleading, as it must be served on all the parties affected by it, and it is not necessary to serve with it a copy of the answer. When filed after the answer, it must be by leave of court, and should aver that it is so filed, though that is not essential, as it will so appear by the minutes of the court. It seems to be essential that the name "cross-complaint" be given to this pleading, or at least that it should not be misnamed. Where a defendant styled his pleading a "counterclaim," and not a "cross-complaint," he will not be permitted in the appellate court to say for the first time that it was a cross-complaint, and that he was entitled to a judgment because its allegations were not

<sup>21</sup> Collins v. Bartlett, 44 Cal. 381; Kreichbaum v. Melton, 49 id. 55; Winter v. McMillan, 87 id. 263; Coulthurst v. Coulthurst, 58 id. 239; Scheffelin v. Weatherred, 19 Oreg. 172; Murray v. Hobson, 10 Col. 66.

<sup>22</sup> Bradford v. Andrews, 20 Ohio St. 208; 5 Am. Rep. 645.

<sup>23</sup> Klonne v. Bradstreet, 7 Ohio St. 322.



denied.<sup>24</sup> So where matters which are proper matters of defense are pleaded as such, they will be regarded only in that light, notwithstanding a prayer for relief at the conclusion. To constitute a cross-complaint, the facts constituting the cause of complaint must be separately stated as a cause of action against the plaintiff, and not as a defense to the plaintiff's cause of action.<sup>25</sup>

**§ 4556. Parties.** Relief, under a cross-complaint, may be had against any party, or parties, to the action, if it relates to or depends upon the contract or transaction upon which the action is brought, or affects the property to which the action relates.<sup>26</sup> It is a general rule that a cross-bill can not be filed by any person not a party to the original suit, yet it has been held that a purchaser *pendente lite* from a party to the suit is a privy, and may file a bill in the nature of a cross-bill, to make himself a party to the suit, so as to have his rights protected.<sup>27</sup> It is said, however, in *Shields v. Barrow*, 17 How. (U. S.) 45, that new parties can not be introduced into a cause by a cross-bill. The liberal provisions of the Codes in regard to new parties, substitution of parties, and intervention will in most cases remove all difficulties in regard to proper parties to a cross-complaint. In analogy to relief prayed by the plaintiff in his complaint, which will be refused unless proper parties are made, a cross-complaint will not be entertained where the relief sought would affect the rights of persons not made parties to it.<sup>28</sup>

<sup>24</sup> *McAbee v. Randall*, 41 Cal. 137; compare *Holmes v. Richet*, 56 id. 307; *Gregory v. Bovier*, 77 id. 121. If a defendant has a cause of cross-complaint, and wishes affirmative relief, his pleading should show distinctly that it was intended as a cross-complaint. If it commences as follows: "And for a further and separate answer and defense to said action, defendant avers, by way of cross-complaint," the pleading will be construed against the pleader, and as against him it will be treated as an answer merely. *Shain v. Belvin*, 79 Cal. 262; *Goldman v. Bashore*, 80 id. 146. Instead of setting up separate rights in the form of two cross-complaints they should be stated separately in one cross-complaint to avoid confusion. *Van Bibber v. Hilton*, 84 Cal. 585.

<sup>25</sup> *Doyle v. Franklin*, 40 Cal. 110; and see *Blum v. Robertson*, 24 id. 141; *Jones v. Jones*, 38 id. 585.

<sup>26</sup> Cal. Code Civ. Pro., § 442.

<sup>27</sup> *Whitbeck v. Edgar*, 2 Barb. Ch. 106; *Jones v. Smith*, 14 Ill. 229.

<sup>28</sup> *Bibb v. Wilson*, 31 Miss. 624. The defendant may, by his cross-complaint, bring in whatever parties are necessary to a determina-



**§ 4557. Service of.** Section 442, California Code of Civil Procedure, provides that "the cross-complaint must be served upon the parties affected thereby."<sup>29</sup> Section 1015 provides that in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorneys, instead of the party, except of subpoenas, of writs, and other process issued in the suit, and of papers to bring him into contempt.

**§ 4557a. Cross-complaint — in what cases allowable.** There may be a cross-complaint in an action for divorce or annulment of marriage.<sup>30</sup> So, a cross-complaint is proper in an action to quiet title, when it seeks to enforce an equitable title against the plaintiff as the holder of the legal title.<sup>31</sup> But in actions of ejectment and actions to quiet title, in which the defendant relies upon title in himself, a cross-complaint is held to be unnecessary, and may be stricken out.<sup>32</sup> A cross-complaint to recover damages for a trespass on land can not be filed in an action to recover damages for a trespass to personal property, unless it appears therefrom that the trespass on the land related to or depended upon or affected the trespass charged in the complaint.<sup>33</sup> A contract of the plaintiff in ejectment to convey land in suit to the defendant, made before suit brought, is a defense to the suit, and may be specifically enforced by way

tion of the controversy. *Winter v. McMillan*, 87 Cal. 256; 22 Am. St. Rep. 243; also, *Allen v. Tritch*, 5 Col. 228; *Bunce v. Bunce*, 59 Iowa, 534; *State Bank v. Christ*, 82 Id. 56; *Rudy v. Austin*, 56 Ark. 73; *Brandon Mfg. Co. v. Prime*, 14 Blatchf. 371; *Chalmers v. Trent*, 11 Utah, 88. Thus, where the defendant claims under an execution sale of the interest of a beneficiary in possession, for whose benefit the plaintiff holds the legal title, such beneficiary is a proper and necessary party, and may be brought in by the cross-complaint. *Winter v. McMillan*, 87 Cal. 256; 22 Am. St. Rep. 243.

<sup>29</sup> See, also, *White v. Patton*, 87 Cal. 151; *Chalmers v. Trent*, 11 Utah, 88; *Idaho Rev. Stat.* (1887), § 4198.

<sup>30</sup> *Wadsworth v. Wadsworth*, 81 Cal. 182; 15 Am. St. Rep. 38; *Blakely v. Blakely*, 89 Cal. 324.

<sup>31</sup> *Winter v. McMillan*, 87 Cal. 256; 22 Am. St. Rep. 243.

<sup>32</sup> *Miller v. Luco*, 80 Cal. 261; *Meeker v. Dalton*, 75 Id. 156; *Mills v. Fletcher*, 100 Id. 142.

<sup>33</sup> *Demartin v. Albert*, 68 Cal. 277. It was held that in an action sounding in tort the defendant can not obtain affirmative relief by way of cross-complaint. *Heilbron v. Kings River, etc., Co.*, 76 Cal. 11; overruled, in *Van Bidder v. Hilton*, 84 Id. 585, 590.

of cross-complaint.<sup>34</sup> But in an action by a vendor to recover possession, a cause of action existing in favor of the vendee for the recovery of the money paid, on the ground of the failure of the vendor's title, can not be set up by way of cross-complaint.<sup>35</sup>

**§ 4558. Demurrer to answer and cross-complaint.** The plaintiff may, within the same length of time after service of the answer as the defendant is allowed to answer after service of summons, demur to the answer of the defendant, or to one or more of the several defenses or counterclaims set up in the answer.<sup>36</sup> Demurrer may be taken upon one or more of the following grounds: 1. That several causes of counterclaim have been improperly joined; 2. That the answer does not state facts sufficient to constitute a defense or counterclaim; 3. That the answer is ambiguous, unintelligible, or uncertain.<sup>37</sup> Demurrer to cross-complaint may be made same as to original complaint.<sup>38</sup>

**§ 4559. Demurrer to answer.**

*Form No. 1122.*

[TITLE.]

The plaintiff demurs to the answer of the defendant [or the first or other defense or counterclaim contained in the answer of the defendant], for insufficiency, in not stating facts sufficient to constitute a defense [or counterclaim, or state other statutory ground].

**§ 4560. Demurrer, when lies.** Demurrer will lie to a bill called a "cross-bill," if it is not really so;<sup>39</sup> or to a supplemental pleading;<sup>40</sup> or to an amended answer, just as if it were an original one. The rule is well settled that the amended pleading takes the place of and supersedes the original one.<sup>41</sup> A de-

<sup>34</sup> Nunez v. Morgan, 77 Cal. 427.

<sup>35</sup> Hoffman v. Remnant, 72 Cal. 1.

<sup>36</sup> Cal. Code Civ. Pro., § 443; see N. Y. Code, § 494; Laws of Oregon, § 76; see, also, Demurrer vol. II., § 3068 *et seq.*

<sup>37</sup> Cal. Code Civ. Pro., § 443.

<sup>38</sup> *Id.*, § 442; see, also, N. Y. Code, § 495. See, as to motion to strike out, *ante*, "Amendments."

<sup>39</sup> Moss v. Anglo-Egyptian Navigation Co., L. R., 1 Ch. 108. Demurrer to counterclaim. See Stevens v. Andrews, 10 Col. 402; Phillips v. Port Townsend Lodge, 8 Wash. St. 529.

<sup>40</sup> Goddard v. Benson, 15 Abb. Pr. 191.

<sup>41</sup> Van Santv. Pl. 795; Sands v. Calkins, 30 How. Pr. 1.

murrer will not lie to an amended answer, amended by leave of the court, in plaintiff's presence, but objection should be raised at the time of application for the amendment.<sup>42</sup> A brief statement appended to the general issue is but a notice, requiring no answer, and is not, therefore, the subject of a demurrer.<sup>43</sup> Where amendments are made to a plea, and it is still insufficient, the plaintiff should demur.<sup>44</sup> Where a plea in its commencement professes to answer the whole action, but answers only a part, it is bad on general demurrer.<sup>45</sup> Under the New York Code, section 494, demurrer to answer seems to lie only in regard to new matter contained therein, and many decisions turn on the question as to whether or not the matter pointed out is new matter. Such decisions are inapplicable to California. Hypothetical averments are not demurrable on that ground.<sup>46</sup> Demurrer will not lie for an omission to answer an allegation of the complaint;<sup>47</sup> or in respect of wholly immaterial matter;<sup>48</sup> unless immaterial matter forms part of a defense, otherwise insufficient, and is relied on as a bar.<sup>49</sup>

**§ 4561. Effect of demurrer.** A general demurrer to a plea confesses all the facts in the plea, if they are well pleaded;<sup>50</sup> but not the soundness of the conclusions of law.<sup>51</sup> Where the allegations of an answer are contradictory, a demurrer only admits those allegations which the law adjudges to be true.<sup>52</sup> A demurrer to an answer to a petition for a writ of mandate is an admission of the truth of matters averred in the answer.<sup>53</sup>

<sup>42</sup> *Therasson v. Peterson*, 22 How. Pr. 98.

<sup>43</sup> *Leslie v. Harlow*, 18 N. H. 518.

<sup>44</sup> *Cox v. Capron*, 10 Mo. 691.

<sup>45</sup> *Welmer v. Shelton*, 7 Mo. 237; *Thumb v. Walrath*, 6 How. Pr. 196.

<sup>46</sup> *Taylor v. Richards*, 9 Bosw. 679. For objections which require consideration of the court and to be substantiated by argument, see *Littlejohn v. Greeley*, 22 How. Pr. 345; *S. C.*, 13 Abb. Pr. 311.

<sup>47</sup> *Smith v. Greenin*, 2 Sandf. 702.

<sup>48</sup> *Newman v. Otto*, 4 Sandf. 668; *Matthews v. Beach*, 5 id. 256.

<sup>49</sup> *Fry v. Bennett*, 5 Sandf. 54; *Ayres v. Covill*, 18 Barb. 260.

<sup>50</sup> *Washington & Baltimore Turnpike Road v. State*, 19 Md. 239; *Lyon v. O'Kell*, 14 Iowa, 233. A demurrer to an answer admits not only the facts alleged therein, but also, for the purpose of determining the sufficiency of the complaint, that the facts alleged in the complaint which are denied in the answer form no part of the plaintiff's cause of action. *Sheward v. Water Co.*, 90 Cal. 635.

<sup>51</sup> *Branham v. San Jose*, 24 Cal. 585.

<sup>52</sup> *Freeman v. Frank*, 10 Abb. Pr. 370.

<sup>53</sup> *Middleton v. Low*, 30 Cal. 596.

§ 4562. **Grounds for demurrer.** A demurrer to an answer must state the grounds.<sup>54</sup> Objections to an inadmissible counterclaim or set-off may be taken by demurrer.<sup>55</sup> Demurrer lies to an insufficient defense;<sup>56</sup> or insufficiently pleaded.<sup>57</sup> Mere irrelevancy is no ground for demurrer.<sup>58</sup> A plea that defendant is civilly dead is open to demurrer.<sup>59</sup> An objection that the plea amounts to the general issue can only be taken advantage of by a special demurrer.<sup>60</sup> An objection to an answer on the ground that separate defenses are not separately stated, can not be taken by demurrer. The defect can only be reached by a motion to strike out, or by some other appropriate proceeding.<sup>61</sup> In an action founded on contract, an answer which joins by way of counterclaim, causes of action for goods, wares and merchandise sold and delivered, for money paid, laid out, and expended, and for money had and received, is not demurrable under the Code, if such pleading would have been sufficient as a declaration at common law.<sup>62</sup> A general denial in an answer to an unverified complaint by an administrator in an action to quiet title, puts in issue the plaintiff's title and position as administrator, and a demurrer to such answer can not properly be sustained.<sup>63</sup>

§ 4562a. **Demurrer to separate defense.** A general demurrer going to the whole answer, there being one good traverse to the cause of action stated in the complaint, should be overruled.<sup>64</sup> In passing upon a demurrer to a separate defense purporting to

<sup>54</sup> *Ketcham v. Zerega*, 1 E. D. Smith, 554.

<sup>55</sup> *Merritt v. Millard*, 5 Bosw. 645; *Sands v. Calkins*, 30 How. Pr. 1; *Phillips v. Port Townsend Lodge*, 8 Wash. St. 529.

<sup>56</sup> *Merritt v. Millard*, 5 Bosw. 645; *Merchants' Bank of New Haven v. Bliss*, 21 How. Pr. 365; *S. C.*, 13 Abb. Pr. 225; *Schermerhorn v. Gouge*, *id.* 315; *Wheeler v. West*, 78 Cal. 95.

<sup>57</sup> *Arthur v. Brooks*, 14 Barb. 533; *Smith v. Countryman*, 30 N. Y. 655.

<sup>58</sup> *Watson v. Husson*, 1 Duer, 242.

<sup>59</sup> *Freeman v. Frank*, 10 Abb. Pr. 370.

<sup>60</sup> *Swearingen v. Knox*, 10 Mo. 31; *Hotchkiss v. Ladd*, 36 Vt. 598; 86 Am. Dec. 679.

<sup>61</sup> *Hagley v. Hagley*, 68 Cal. 348.

<sup>62</sup> *Clay v. Carroll*, 67 Cal. 19.

<sup>63</sup> *Pennie v. Hildreth*, 81 Cal. 127.

<sup>64</sup> *County Commissioners v. Long*, 8 Col. 438.

be an answer to the whole complaint, such defense is to be considered as though it were the only answer in the case, and with this limitation, the demurrer brings up for review the entire pleadings.<sup>65</sup> Where a demurrer to a separate defense in an answer setting up a defect of parties plaintiff is erroneously overruled, the error is without prejudice to the plaintiffs if the defendants subsequently abandon the defense.<sup>66</sup>

**§ 4562b. Failure of court to pass upon demurrer.** The failure of the court to pass upon a demurrer to an answer is not an error of which the defendant can complain, where he does not attend the trial nor object to a trial at the time, and the plaintiff insists upon trying the issues of fact.<sup>67</sup>

**§ 4563. Waiver by failure to demur.** Failure of plaintiff to demur waives the objection.<sup>68</sup> Omission to demur to counterclaims has the same effect as omission to demur to complaint.<sup>69</sup> Where a party sets up matter in his answer not recognized by law as a defense to the action, the objection is not waived by failure of plaintiff to demur, but may be taken advantage of at any time.<sup>70</sup> Where there was a demurrer to a rejoinder, which demurrer was sustained by the court below, and the party, on leave, filed an amended rejoinder, it was held that the appellate court would not decide upon the demurrer. The point was waived by filing the amended rejoinder.<sup>71</sup> Where a case is tried on the theory that the answer presents a sufficient denial to the allegations of the complaint, the objection to the sufficiency of such denials can not be raised for the first time on appeal.<sup>72</sup>

<sup>65</sup> *Fisk v. Reser*, 19 Cal. 88.

<sup>66</sup> *Burroughs v. De Coutts*, 70 Cal. 361.

<sup>67</sup> *Fletcher v. Malcolmson*, 96 Cal. 38; *McCarthy v. Yale*, 39 id. 585.

<sup>68</sup> *Ritchie v. Davis*, 5 Cal. 453; *White v. Spencer*, 4 Kern. 248; *N. Y. Central Ins. Co. v. Nat. Pro. Ins. Co.*, id. 85.

<sup>69</sup> *Ayres v. O'Farrell*, 10 Bosw. 143.

<sup>70</sup> *Macdougall v. Maguire*, 35 Cal. 274; 95 Am. Dec. 98; *Case v. Maxey*, 6 Cal. 276.

<sup>71</sup> *United States v. Boyd*, 5 How. (U. S.) 29.

<sup>72</sup> *White v. S. R. & S. Q. R. R. Co.*, 50 Cal. 417; see, also, *King v. Davis*, 34 id. 106. A demurrer to the answer will be deemed to be waived when the court proceeds to try the case without a ruling on the demurrer, and without the plaintiffs calling for any ruling, or calling the attention of the court to it in any way. *Silcox v. Lang*, 78 Cal. 118.

§ 4564. **What demurrer should show.** The demurrer should show to which of several defenses it is interposed. Where, however, a demurrer to an answer containing two defenses, one of which was good, and the other bad, purported to be to the whole answer, but it was evident from the assignment of grounds of the demurrer that it had reference to the second defense only, it was held that it was not error, under the liberal mode of construing pleadings enjoined by the Code, to construe it as being substantially limited to the badly pleaded defense, and to render judgment allowing it accordingly.<sup>73</sup>

§ 4565. **Replication.** Under the California Code of Civil Procedure, no reply to new matter in the answer, or to a counterclaim, is required; but such matter must, on the trial, be deemed controverted by the opposite party.<sup>74</sup> But in New York, Ohio, Wisconsin, Colorado, Washington, and other states, new matter, pleaded either as a defense or as a counterclaim, requires a reply. Such is certainly the more rational mode of pleading. In view of the practice in those states where a replication is required or permitted, we retain in this revision the forms and notes under the above title. The answer to a cross-complaint does not differ from an answer to an original complaint, either in form or substance, and the pleader is referred to that portion of the work treating of answers in general.<sup>75</sup>

§ 4566. **Reply to counterclaim.**

*Form No. 1123.*

[TITLE.]

The plaintiff replies to the counterclaim contained in the answer of the defendant [or the first or other counterclaim contained in the answer of the defendant].

I. That, etc. [denying as in an answer].

§ 4567. **Chancery practice.** In general, if the complainant in a bill in chancery does not file a general replication to the answer of the defendants, the answer is to be taken as true, and

<sup>73</sup> *Matthews v. Beach*, 8 N. Y. 173; see § 4562a, *ante*.

<sup>74</sup> See § 462; *In re Garcelon*, 104 Cal. 581; *Grangers' Assoc. v. Clark*, 84 id. 201.

<sup>75</sup> A paper filed in an action by the plaintiff, and styled an "answer to the defendant's cross-complaint," will not be considered as a pleading when no cross-complaint is filed. *Carroll v. Fire Ins. Co.*, 72 Cal. 297; see *Warner v. Darrow*, 91 id. 309.

no evidence can be given by the complainant to contradict it.<sup>76</sup> After a cause was set for hearing, on bill and answer, and reference to the auditor directed, the plaintiff was allowed to file a general replication.<sup>77</sup> A replication to a plea in chancery is an admission of its sufficiency as a defense.<sup>78</sup>

**§ 4568. Conclusion.** A replication containing new matter should conclude with a verification, and not to the country.<sup>79</sup> But if it states no new matter, it may conclude to the country.<sup>80</sup> A replication at once denying the particular fact intended to be put in issue, and concluding to the country, without any preamble, and without a formal traverse, frequently occurs in practice; and on account of conciseness should, when practicable, be adopted.<sup>81</sup> If the plea answers the matter which is the gist of the action, it is sufficient.<sup>82</sup> In an action of debt against devisees, a replication of assets by descent may conclude with a verification.<sup>83</sup>

**§ 4569. Counterclaim of defendant.** A counterclaim is in the nature of a complaint in a cross-action. If it is a demand for damages for converting property, it is not necessary for the plaintiff to put in a reply denying the amount of value, or the allegation of damage. These must be proved on an assessment, although the plaintiff puts in no reply.<sup>84</sup> And defendant is entitled to only nominal damages, unless he proves substantial damage.<sup>85</sup> A reply merely denying that the defendant is entitled to any sum admits the facts set up, as in counterclaim.<sup>86</sup> The plaintiff's complaint contained eight counts in the common form; the defendant's answer denied generally all the allegations of the complaint, and set up a counterclaim; the plaintiff's reply contained, among other things, a counterclaim to

<sup>76</sup> *Gallagher v. Roberts*, 1 Wash. C. C. 320; *Pierce v. West*, Pet. C. C. 351.

<sup>77</sup> *Pierce v. West*, Pet. C. C. 351.

<sup>78</sup> *Hughes v. Blake*, 6 Wheat. 453; affirming S. C., 1 Mason, 515.

<sup>79</sup> *Hallett v. Slidell*, 11 Johns. 56; *Hanna v. Rust*, 21 Wend. 149.

<sup>80</sup> *Bindon v. Robinson*, 1 Johns. 516; *Patcher v. Sprague*, 2 id. 462.

<sup>81</sup> 1 Chit. Pl. 592; 2 T. R. 442.

<sup>82</sup> *Andrus v. Waring*, 20 Johns. 153; see, also, *Snider v. Croy*, 2 id. 428.

<sup>83</sup> *Labagh v. Cantine*, 13 Johns. 272.

<sup>84</sup> *Connoss v. Meir*, 2 E. D. Smith, 314.

<sup>85</sup> *McKensie v. Farrell*, 4 Bosw. 192; *Merritt v. Millard*, 5 id. 645.

<sup>86</sup> *McKensie v. Farrell*, 4 Bosw. 192.

the defendant's counterclaim, and the defendants moved to strike out this portion of the reply; it was held that defendants had mistaken their remedy; they should have demurred. Whether such reply is good, *quaere*.<sup>87</sup>

§ 4570. **Form.** A replication which is merely a denial is not special.<sup>88</sup> Where the defendant pleads a record of the same court, the replication of *nul tiel record* concludes with a verification, and a day is given to the parties to have judgment; if the plea be of a record of another court, the replication may either conclude by giving the defendant a day to bring in the record, or with an averment, and prayer of debt and damages; in which latter case, there must be a rejoinder reasserting the existence of the record.<sup>89</sup>

§ 4571. **When not permitted.** A reply can not be permitted where no counterclaim is interposed by the answer. New matter which does not constitute a counterclaim is to be deemed controverted.<sup>90</sup> Under the statute of California, the affirmative allegations of the answer stand controverted by the plaintiff; the burden being on the defendant to prove their truth, rendering a reply unnecessary.<sup>91</sup> And a counterclaim, or matter in avoidance, set up in an answer, need not be denied by plaintiff to put defendant upon his proof.<sup>92</sup> In Pennsylvania, where the replication puts in issue the averments of the answer, it throws upon the defendants the burden of sustaining them.<sup>93</sup>

§ 4572. **General denial of new matter.**

*Form No. 1124.*

[TITLE.]

The plaintiff replies to the answer of the defendant:

I. That he denies each and every allegation contained in the [second] defense.

II. [Or, as to the (second) defense, by way of counterclaim set forth in the answer, he denies each and every allegation therein.]

<sup>87</sup> *Stewart v. Travis*, 10 How. Pr. 148.

<sup>88</sup> *Manhattan Co. v. Miller*, 2 Cal. 60.

<sup>89</sup> *Bobyshall v. Oppenheimer*, 4 Wash. C. C. 388.

<sup>90</sup> *Devlin v. Bevins*, 22 How. Pr. 290; see *Bissell v. Pearse*, 21 id. 130.

<sup>91</sup> *Bryan v. Maume*, 28 Cal. 238; *Grangers' Assoc. v. Clark*, 84 id. 201.

<sup>92</sup> *Herold v. Smith*, 34 Cal. 122.

<sup>93</sup> *Nagle's Estate*, 52 Penn. St. 154.



**§ 4573. Special denial.**

*Form No. 1125.*

[TITLE.]

The plaintiff replies to the answer of the defendant:

That he denies [here insert the particular allegation denied].

**§ 4574. Sufficient reply.** If an answer alleges mere matters of evidence, a replication traversing the ultimate and issuable fact which the answer was intended to aver is sufficient.<sup>94</sup>

**§ 4575. Reply interposing both denial and new matter.**

*Form No. 1126.*

[TITLE.]

The plaintiff replies to the answer of the defendant herein:

First. For a first reply to the [first] counterclaim:

He denies each and every allegation of the answer respecting the same.

Second. For a second reply to said counterclaim he alleges:

That at the time alleged in the complaint as the time of making the supposed note therein mentioned, this plaintiff was under the age of twenty-one years, to-wit, of the age of . . . . . years.

**§ 4576. Practice in California.** In California, there is no such practice as pleading a counterclaim to a counterclaim. But the plaintiff may have the benefit of a counterclaim to defendant's counterclaim without pleading it, as he has no opportunity of doing so.<sup>95</sup> In Indiana, if the defendant pleads a counterclaim in his answer, the plaintiff may reply a counterclaim to it.<sup>96</sup> The replication may introduce new matter to explain and fortify the complaint without a departure.<sup>97</sup> It has been held, in the United States Circuit Court, that the practice now is, where the plaintiff finds it necessary, from the answer, to prove new matter, to amend the bill. Nevertheless, if a special replication containing the essential qualities of a general replication is filed, denying all the material parts of

<sup>94</sup> *Moore v. Murdock*, 26 Cal. 514.

<sup>95</sup> *Hart v. Cooper*, 47 Cal. 78. Whether a plaintiff may interpose in his reply a counterclaim to the counterclaim of the defendant, compare *Miller v. Losee*, 9 How. Pr. 356; *Stewart v. Travis*, 10 id. 148.

<sup>96</sup> *House v. McKinney*, 54 Ind. 240.

<sup>97</sup> *Hallett v. Slidell*, 11 Johns. 56.

the answer, and also charging new matter, it will be considered as surplusage at the hearing.<sup>98</sup> A departure in pleading is not allowed in equity. If the answer requires a new case to be made, it can not be done in the replication, but must be by an amendment to the bill.<sup>99</sup>

§ 4577. To plea of bankruptcy. A replication setting forth, in the words of the act, all the grounds on which a discharge would be void by the act is bad; it must specify the particular fraud relied on.<sup>100</sup>

§ 4578. To plea in bar. Though in England a court of law protects the title of an equitable owner of a chose in action, sued on in the name of the legal owner, by refusing to receive a plea which is in fraud of his rights, yet they will not allow these rights to be shown by way of replication to what is a good plea in bar of the action of the plaintiff, nor admit them to be relied on at the trial. The law of the United States courts is otherwise; and the proper practice is to reply the equitable title and notice thereof to the defendant, and thus show the asserted bar to be in fraud of his rights; and when thus shown, the bar is adjudged insufficient.<sup>101</sup>

§ 4579. To plea of former recovery. Plaintiff replied *pro-testando* that in a former action two trespasses had been joined in the same count, and the court, on notice, compelled him to elect for which he would proceed, and that he should not go for both; and that the jury found damages accordingly; it was held that the former recovery was no bar, but the replication was bad, as being argumentative instead of traversing and denying the former recovery.<sup>102</sup> A replication to a plea of a former recovery that the evidence was wholly insufficient to establish the claim, or that no evidence was offered or received by the court, will not avoid the bar.<sup>103</sup>

§ 4580. To plea of fraud. In an action on a note the plea was that the note was given by the defendant to the plaintiff in

<sup>98</sup> *Dupon't v. Mussy*, 4 Wash. C. C. 128.

<sup>99</sup> *Vattier v. Hinde*, 7 Pet. 252.

<sup>100</sup> *Service v. Heermance*, 2 Johns. 96.

<sup>101</sup> *L'Invincible*, 1 Wheat. 233; *Corser v. Craig*, 1 Wash. C. C. 424; *Briggs v. Darr*, 19 Johns. 95; *Warren v. Emerson*, 1 Curt. C. C. 239; *Brown v. Hartford Ins. Co.*, 11 Law Rep. (N. S.) 726.

<sup>102</sup> *Snider v. Croy*, 2 Johns. 227.

<sup>103</sup> *Ramsey v. Herndon*, 1 McLean, 450.

payment for land which the defendant had been induced to buy of him by his false and fraudulent representations that he was the owner of it; it was held that fraud was the material allegation, and a replication denying the fraudulent representation was a perfect answer.<sup>104</sup> If the maker of a note pleads a set-off, and that the paper was fraudulently transferred to the plaintiff to prevent the set-off, a replication merely alleging legal title admits the fraudulent transfer and the set-off.<sup>105</sup>

§ 4581. **To plea of judgment.** If a defendant pleads judgment and no assets *ultra*, replication thereto may either be *nulli record*, or assets *ultra*, or *per fraudem*, or other matter of facts; and such replications are probably triable by jury.<sup>106</sup> If the plea avers that the promise sued on was a promise to pay the debt of another, to-wit, B., a replication that the promise was not a promise to pay the debt of said B. is good.<sup>107</sup>

§ 4582. **To plea of justification.** A replication neither answering nor aiding the matter of a special plea of justification is bad.<sup>108</sup> In trespass, where the defendant pleads in justification, a simple reference to a statute, the plaintiff must reply *de injuria propria*.<sup>109</sup> The general replication *de injuria sua propria absque tali causa* is bad when the defendant insists on a right, and is good only when he insists on matter of excuse.<sup>110</sup> In a plea justifying an arrest under process, an allegation of its loss, by way of an excuse for not producing it, does not turn the justification into matter of excuse;<sup>111</sup> and a replication may protest the warrant, and conclude *de injuria*, etc.<sup>112</sup> The general replication *de injuria* to a plea of *mollitur manus imposuit*

<sup>104</sup> Bradner v. Demick, 20 Johns. 404.

<sup>105</sup> Savage v. Davis, 7 Wend. 223.

<sup>106</sup> Teasdale v. Brantons, 2 Hayw. 377. Where a judgment is pleaded in bar of an action, a reply setting forth facts showing that the judgment was fraudulently obtained is a sufficient replication to the plea, under Colorado practice. Hallack v. Loft, 19 Col. 74.

<sup>107</sup> Hotchkiss v. Ladd, 36 Vt. 593; 86 Am. Dec. 679.

<sup>108</sup> Foshay v. Riche, 2 Hill, 247.

<sup>109</sup> Comly v. Lockwood, 15 Johns. 188.

<sup>110</sup> Cooper v. Monke, Will. 54; Jones v. Kitchin, 1 Bos. & Pul. 76; Lytle v. Lee, 5 Johns. 112; Plumb v. M'Crea, 12 id. 491; Allen v. Crofoot, 7 Cow. 46; Griswold v. Sedgwick, 1 Wend. 126; Tubbs v. Caswell, 8 id. 129.

<sup>111</sup> Coburn v. Hopkins, 4 Wend. 577.

<sup>112</sup> Stickle v. Richmond, 1 Hill, 77.

puts in issue every material allegation, including the reasonableness of the force, and the plaintiff may recover, if an excess of force is shown.<sup>113</sup>

**§ 4583. To plea of payment.** When the answer in a suit on a bill of exchange sets up payment, part in money and the residue in bills of exchange, which, it is averred, were received by the plaintiff in payment, a replication which simply avers the nonpayment of the bills and the insolvency of the drawers and drawees at their maturity, tenders an immaterial issue, and the finding should be for the defendant, upon the pleading.<sup>114</sup> Reply is unnecessary to an answer pleading merely payment.<sup>115</sup> An answer, for a defense, for the demand sued for, averred that the defendant had paid certain sums to plaintiff, and concluded with a notice that defendant would insist on the sums so paid as a counterclaim, and a demand for judgment; it was held that this did not set up a counterclaim, but the facts pleaded amounted to the defense of payment only, and, therefore, no reply was necessary.<sup>116</sup>

**§ 4584. To plea of performance.** A replication to a plea of general performance, in an action on a bond, should assign a special breach. An omission to do so must be taken advantage of by demurrer, and is cured by verdict.<sup>117</sup>

**§ 4585. To a plea of privilege by an attorney,** it is a good replication that for a year he had ceased to practice.<sup>118</sup>

**§ 4586. To a plea of usury.** The plaintiff may reply that it was not corruptly agreed, in manner and form, etc., without a traverse, and with a conclusion to the country.<sup>119</sup>

<sup>113</sup> *Bennett v. Appleton*, 25 Wend. 371.

<sup>114</sup> *Frisbee v. Lindley*, 23 Ind. 511.

<sup>115</sup> *Brackett v. Wilkinson*, 13 How. Pr. 102. In an action for wages, where the answer sets up a settlement and discharge as a defense, no reply is necessary. *Maricle v. Brooks*, 5 N. Y. Supp. 210; 51 Hun, 638. In Oregon, a plea of payment in an answer is new matter, which, not being denied by the reply, stands admitted. *Agr. Works v. Creighton*, 21 Oreg. 495.

<sup>116</sup> *Burke v. Thorn*, 44 Barb. 363.

<sup>117</sup> *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46-70.

<sup>118</sup> *Brooks v. Patterson*, Col. & C. Cas. 133.

<sup>119</sup> *Buynham v. Matthews*, 2 Stra. 871; *Waterman v. Haskin*, 7 Johns. 283.

§ 4587. **Reply of Statute of Limitations.**

*Form No. 1127.*

[TITLE.]

The plaintiff replies to the answer herein:

That the said cause of action alleged for a counterclaim [or demand alleged as a set-off] in said answer did not accrue at any time within . . . . . years next before the commencement of this action.

§ 4588. **Facts must be alleged.** Where the Statute of Limitations is pleaded at law or in equity, and the plaintiff desires to bring himself within its savings, he must, in his replication, or by an amendment to his bill, set forth the facts specially.<sup>120</sup>

**4589. Facts must be traversed.** In the correct order of pleading, it is necessary that the facts of the plea should be traversed by the replication, unless matters in avoidance be set up. It is not sufficient that the facts alleged in the replication are inconsistent with those stated in the plea; an issue must be taken on the material allegations of the plea.<sup>121</sup>

§ 4590. **Fraud as a reply.** Fraud is a sufficient answer to the plea of the Statute of Limitations; and if the defendant fraudulently seized the notes, he is not only estopped from setting up the statute, but it would begin to run only from the discovery of the fraud.<sup>122</sup>

§ 4591. **Insufficient reply.** A replication to a plea of the Statute of Limitations that the plaintiff lives in another state, there being no such exception in the statute, is bad.<sup>123</sup> To a plea of the Statute of Limitations, it is not a good replication

<sup>120</sup> *Miller v. McIntyre*, 6 Pet. 61; affirming S. C., 1 McLean, 85; *Platt v. Vattier*, 9 Pet. 405; *Taylor v. Benham*, 5 How. (U. S.) 233; *Marsteller v. McClean*, 7 Cranch, 156; see § 3326, *ante*. To an answer setting up the six years' Statute of Limitations, a reply, in general terms, that the defendant has made payments on the claim within six years, is sufficient without pleading the particulars. *Board, etc. v. Cole*, 8 Ind. App. 485. Under California practice, when a defendant pleads the Statute of Limitations, matters upon which the plaintiff relies to relieve him from the bar of the statute are deemed to have been pleaded in reply to the answer. *Fox v. Tay*, 89 Cal. 339; 23 Am. St. Rep. 474.

<sup>121</sup> *United States v. Buford*, 3 Pet. 12; *Jones v. Hays*, 4 McLean, 521.

<sup>122</sup> *Bricker v. Lightner's Executor*, 40 Penn. St. 190.

<sup>123</sup> *Jones v. Hays*, 4 McLean, 521.

that a suit for the same demand was commenced in a court in another state, and discontinued within six years.<sup>124</sup> When the plea avers that the cause of action mentioned in the declaration did not, nor did either of them, accrue within six years, a replication which alleges that said causes of action, or some of them, did accrue within six years, is bad for uncertainty.<sup>125</sup> A replication of a new promise by the executor, to his plea of the Statute of Limitations, to a count on the promise of the testator, is bad for departure.<sup>126</sup> In general, a replication must not depart from any material allegation in the complaint; yet, where there is an evasive plea, the plaintiff may avoid the effect of it by restating his cause of action with more particularity and certainty, so as to meet and thwart the particular defense set up.<sup>127</sup>

§ 4592. **Promissory note.** Where, in an action on a promissory note, brought under the Code of 1848, the defendant pleaded the Statute of Limitations, and the plaintiff replied, merely denying the plea, it was held that evidence of a new promise was admissible under the reply.<sup>128</sup> Where, in an action by an executor upon notes due to his testator by the defendant, who, it was alleged, had fraudulently seized them after the death of the testator, the defendant pleaded the Statute of

<sup>124</sup> Delaplaine v. Crowninshield, 3 Mason, 329.

<sup>125</sup> Hotchkiss v. Ladd, 36 Vt. 593; 86 Am. Dec. 679.

<sup>126</sup> Benjamin v. De Groot, 1 Den. 151.

<sup>127</sup> 1 Chit. Pl. 603; Troup v. Smith, 20 Johns. 33. A reply can serve the plaintiff no purpose, except to controvert or avoid new matters set up in the answer. Lillienthal v. Hotelling Co., 15 Oreg. 371. He can not set up one cause of action in his complaint, and, after answer made, abandon that and make an entirely new cause of action on a reply. Osten v. Winehill, 10 Wash. St. 333; Clark v. Sherman, 5 Id. 681. Nor can a claim for relief, as set forth in the complaint, be in any manner enlarged in reply to the defendant's answer. Bell v. Wandby, 4 Wash. St. 743. As to new matter contained in the answer the replication should follow the requisites of an answer, whether the denial should be general or specific. Hammer v. Edwards, 3 Mont. 187; see § 4592b, *post*, as to sufficiency of reply. In an action for work and labor done, in which a counterclaim for different items is set up, a reply alleging that the amounts of the items are less than that set forth in the counterclaim, and have been fully paid, without asking any affirmative relief, is not inconsistent with the complaint. Van Bibber v. Fields, 25 Oreg. 527.

<sup>128</sup> Esselstyn v. Weeks, 2 Abb. Pr. 272.

Limitations, after the commencement of the trial, and it was evident that the fraudulent seizure was the plaintiff's answer to the plea, it was held that the want of a formal replication was not cause for reversing the judgment.<sup>129</sup>

§ 4592a. **Reply — when unnecessary.** If the answer is wholly lacking in substance as to the essentials which constitute a good answer, no reply is necessary.<sup>130</sup> Whatever facts are alleged in the answer, that might have been proved under a specific denial of the allegations of the complaint, should be regarded as specific denial only, and require no replication.<sup>131</sup> But whatever averments of the answer amount to an admission of the allegations of the complaint, and tend to establish some fact not inconsistent with such allegations, constituting a defense or counterclaim, and which could not have been proved under a specific denial, are new matter, and require a replication.<sup>132</sup> If there is no replication, all affirmative material allegations of the answer will be presumed to be admitted.<sup>133</sup> But legal conclusions need not be denied.<sup>134</sup> Nor is a party required to reply to evidence set out in an answer.<sup>135</sup> Under New York Code of Civil Procedure, section 516, it is in the discretion of the court to require the plaintiff to reply to new matter set up in answer by way of avoidance.<sup>136</sup> A replication is not necessary to an answer which puts in issue the ownership of the note sued upon, and contains new matter which is not defensive.<sup>137</sup> And the plaintiff need not reply to an affirmative defense until his demurrer to a special defense has been determined.<sup>138</sup>

<sup>129</sup> *Bricker v. Lightner's Executor*, 40 Penn. St. 199.

<sup>130</sup> *Weber v. Rothschild*, 15 Oreg. 385.

<sup>131</sup> *Mauldin v. Ball*, 5 Mont. 96.

<sup>132</sup> *Id.*; *Davis v. Clark*, 2 Mont. 310.

<sup>133</sup> *McMillan v. Carter*, 6 Mont. 215; *Larsen v. Oreg, etc., Nav-Co.*, 19 Oreg. 240.

<sup>134</sup> *Id.*; *Denver, etc., Co. v. Nestor*, 10 Col. 403.

<sup>135</sup> *Steinway v. Steinway*, 22 N. Y. Supp. 945; 68 Hun, 430; 29 Abb. N. C. 457.

<sup>136</sup> *Canchois v. Proctor*, 29 N. Y. Supp. 770; 79 Hun, 388. See, also, as to reply under New York practice, *Wood v. Gordon*, 13 N. Y. Supp. 595; *Springer v. Blen*, 16 Daly, 275; *Van Doren v. Jolliffe*, 20 N. Y. Supp. 636.

<sup>137</sup> *Woolman v. Capital Nat. Bank*, 2 Col. App. 454.

<sup>138</sup> *Ewing v. Van Wagenen*, 6 Wash. St. 39. Waiver of reply to new matter in counterclaim. See *Power v. Bowdle*, 3 N. Dak. 107.

§ 4592b. **Reply — sufficiency of.** In an equity case, the insufficiency of a reply is immaterial, when the defendants wholly fail to substantiate the allegations of their answer.<sup>139</sup> Where a plea of another action pending has been interposed, a reply that, subsequent to the filing of the plea, the suit whose pendency was alleged had been dismissed, is good against demurrer.<sup>140</sup> A reply which merely denies knowledge or information sufficient to form a belief as to whether the facts are correctly stated in the answer, does not deny the material allegations as required by section 516, New York Code of Civil Procedure.<sup>141</sup>

§ 4592c. **The same — time of filing.** The ruling of the trial court permitting the plaintiff to file a reply on the same day that the defendant moves for judgment on the pleadings because of failure to reply, will not be disturbed, when there is no showing of abuse of discretion.<sup>142</sup>

§ 4593. **Demurrer to reply.**

*Form No. 1128.*

[TITLE.]

The defendant demurs to the plaintiff's reply [or first or other reply], for insufficiency, in not stating facts sufficient to constitute a reply.

§ 4594. **Rejoinder, its office.** A rejoinder must answer the replication, and tender an issue on a single point. If it is double, it is demurrable.<sup>143</sup> A rejoinder is bad which avers several distinct answers to the replication, or puts matter of law in issue to the jury.<sup>144</sup> A rejoinder must maintain the plea, and can not set forth matter at variance with it.<sup>145</sup> After pleading that the plaintiff was not damnified, the defendant can not rejoin confessing and avoiding the action,<sup>146</sup> by setting up a personal discharge. So one defendant, having joined with the

<sup>139</sup> Hill v. Young, 7 Wash. St. 33.

<sup>140</sup> Boyle v. Railway Co., 13 Wash. St. 383.

<sup>141</sup> Steinway v. Steinway, 26 N. Y. Supp. 657; 74 Hun, 423.

<sup>142</sup> Stinson v. Sachs, 8 Wash. St. 391.

<sup>143</sup> United States v. Cumpton, 3 McLean, 103; and see McGowan v. Caldwell, 1 Cranch C. C. 481.

<sup>144</sup> McCue v. Corporation of Washington, 3 Cranch O. C. 639.

<sup>145</sup> Barlow v. Todd, 3 Johns. 367; Allen v. Watson, 16 Id. 205.

<sup>146</sup> Munro v. Alaire, 2 Cal. 320.



others in a plea in bar, can not afterwards interpose a rejoinder going to his personal discharge.<sup>147</sup>

§ 4595. **Breach of agreement.** A replication, in an action of covenant on an agreement to build, was held bad for traversing immaterial time and place, and introducing averments of performance before made in the declaration.<sup>148</sup> To a declaration for a breach of agreement to bid at auction up to a certain limit, the defendant pleaded that the property was sold for more; it was held that a reply of fraud in the defendant in allowing the property to be sold for the greater amount was no departure.<sup>149</sup>

§ 4596. **Conversion.** A declaration alleged that the defendants wrongfully took certain goods. The replication averred that the taking was by a sheriff, at the instance and by the direction of the defendants; it was held that there was no departure.<sup>150</sup>

§ 4597. **Demurrer to reply.** The reply of the plaintiff stated that he was himself the receiver mentioned in the answer, and that he was the holder and owner of the note, as such receiver, and that he sought to recover upon it in that capacity, and not individually. The defendant demurred to the reply, assigning several grounds, the substance of which was that the reply was a departure from the complaint; it was held that the demurrer was well taken. The reply was a total departure from the complaint. The right to recover individually and the right to recover as receiver are entirely distinct rights, and depend upon entirely different facts. The plaintiff, on receiving the answer, should have amended his complaint, or if it was not amendable, he should have discontinued.<sup>151</sup>

<sup>147</sup> Andrus v. Waring, 20 Johns. 153.

<sup>148</sup> Rogers v. Burk, 10 Johns. 400.

<sup>149</sup> Bame v. Drew, 4 Den. 287.

<sup>150</sup> Richardson v. Hall, 21 Md. 399.

<sup>151</sup> White v. Miles, 11 How. Pr. 36. A reply which does not respond to the entire pleading, or part thereof, to which it is directed, is bad on demurrer for want of sufficient facts. Pouder v. Tate, 76 Ind. 1; and see Bottlers v. Miller, 112 Id. 584; Silvers v. Canary, 109 Id. 267. But a bad reply is sufficient for a bad answer on demurrer, and a demurrer to such reply ought to be carried back and sustained to such answer. Landon v. White, 101 Ind. 249; State v. Edwards, 114 Id. 581; W. Un. Tel. Co. v. Yopst, 118 Id. 248.

§ 4598. **Departure.** A departure is matter of substance, and bad on general demurrer.<sup>152</sup> A rejoinder of infancy was held a departure from a plea of an insolvent discharge.<sup>153</sup> After a plea of no award, a rejoinder confessing and avoiding the award is a departure.<sup>154</sup> A rejoinder impeaching the award as incomplete is a departure.<sup>155</sup> But a rejoinder that the defendant, prior to the making of the award, had, by writing under his hand and seal, revoked the submission, is good. A void award is no award.<sup>156</sup> A rejoinder affirming the defense of the plea by denying the substance of the replication, without reaffirming an immaterial averment of value in the plea, is not a departure.<sup>157</sup>

§ 4599. **Duplicity.** A replication which alleges two distinct and independent facts, either of which is a complete answer to the plea, is double, and is bad on special demurrer.<sup>158</sup>

§ 4600. **Goods sold.** To a complaint charging acceptance of goods purchased to have been procured by the fraudulent representations of the seller, without examination by the buyer, the defendant answered denying the fraud, and alleging that the buyer had examined the goods and had full knowledge of their quality. The reply admitted an examination of the goods by the plaintiff, and a knowledge of certain facts indicating the defects complained of, but averred that he relied on defendant's representations and that the defendant had subsequently promised to pay the damages claimed; it was held that the reply was a departure, and that objection could be taken to it by demurrer.<sup>159</sup>

§ 4601. **Insurance policy.** To a declaration on a policy of insurance averring a total physical loss, a replication of survey and condemnation after arrival at the port of destination is a departure.<sup>160</sup>

<sup>152</sup> *Sterns v. Patterson*, 14 Johns. 132; see § 3132, *ante*.

<sup>153</sup> *Roberts v. Kelly*, 2 Hall, 307.

<sup>154</sup> *Munro v. Alaire*, 2 Cal. 320.

<sup>155</sup> *Barlow v. Todd*, 3 Johns. 367.

<sup>156</sup> *Blacksell v. Tomkins*, 11 East, 187; *Allen v. Watson*, 16 Johns. 205.

<sup>157</sup> *Burr v. Baldwin*, 2 Wend. 580.

<sup>158</sup> *Burnham v. Webster*, Davies, 236; and see *Craig v. Brown*, Pet. C. C. 443.

<sup>159</sup> *McAroy v. Wright*, 25 Ind. 22.

<sup>160</sup> *Griswold v. National Ins. Co.*, 3 Cow. 96.

§ 4602. *Obstructing highway.* An indictment for obstructing a highway alleged in the first count the obstruction of a road "leading from S.'s gate to B.'s house," and in the second count the obstruction of a road leading "from S.'s gate towards the turnpike." A replication averring that the road ran "from S.'s gate to the turnpike" was held a departure, as the former averred the existence of a public road, while the latter did not.<sup>161</sup>

§ 4603. *Withdrawal of plea.* Where a plaintiff replies to a plea, and his replication being demurred to is held to be insufficient, and he withdraws that replication and substitutes a new one — the substituted one being complete in itself, not referring to or making part of the one which preceded — he waives the right to question in the Supreme Court the decision of the court below on the sufficiency of what he had first replied. The same is true when he abandons a second replication, and with leave of the court files a third and last one.<sup>162</sup>

<sup>161</sup> State v. Price, 21 Md. 449.

<sup>162</sup> Clearwater v. Meredith, 1 Wall. 25.

## CHAPTER IX.

### JUDGMENT ON PLEADINGS.

§ 4604. **In general.** If a complaint be itself sufficient, the plaintiff may apply for judgment on the pleadings, if the defendant has filed an answer which expressly admits the material facts stated in the complaint; or when the answer leaves all the material allegations of the complaint undenied. This practice is constantly pursued when denials in verified answers are literal, conjunctive, evasive, or the like; and is equally applicable where an answer which merely sets up new matter is found substantially insufficient.<sup>1</sup>

§ 4605. **Notice of motion for judgment on the pleadings.**

*Form No. 1129.*

[TITLE.]

Please take notice that the plaintiff will, on the ..... day of ....., 18.., at the courthouse, in the city of ..... and at the hour of ..... o'clock of said day, or as soon thereafter as counsel can be heard, move the court for judgment on the pleadings in said action, on the ground that the answer filed therein is frivolous [or state other grounds]. This motion will be based upon the pleadings on file in said action.

§ 4606. **Defective pleading.** When an answer is put in defective in form only, plaintiff should demur, and not move for judgment on the pleadings.<sup>2</sup> Nor can defendant have judg-

<sup>1</sup> Felch v. Beaudry, 40 Cal. 439; Corwin v. Patch, 4 id. 204; Gay v. Winter, 34 id. 153; Fitzgibbon v. Calvert, 39 id. 261; see, also, N. Y. Code, § 537; Lommet v. Kintzing, 1 Mont. 290; Sands v. Maclay, 2 id. 42; Hemme v. Hays, 55 Cal. 337; Hicks v. Lovell, 64 id. 14; Loveland v. Garner, 74 id. 298; San Francisco v. Staude, 92 id. 560; Kendall v. Mining Co., 9 Col. 349.

<sup>2</sup> Gallagher v. Dunlap, 2 Nev. 326; Childs v. Griswold, 15 Iowa, 438; and see Rice v. Bush, 16 Col. 484. A motion for judgment upon the pleadings based upon a clerical error, which loses its force by the correction of the error, is properly denied. Raker v. Bucher, 100 Cal. 214.

ment on the pleadings on the ground that several causes of action have been improperly joined in the complaint, or a cause of action alleged which is against public policy.<sup>3</sup> If, instead of demurring, advantage be taken of a defective pleading by motion for judgment, the court should permit an amendment of the pleading, where an amendment will cover the defect, the same as if a demurrer had been interposed.<sup>4</sup>

§ 4607. **Denial.** It does not follow because defendant makes no denial of any allegation in the complaint that this is such an admission of the cause of action that a judgment contrary to the admission is erroneous, if affirmative matter of defense is stated.<sup>5</sup> If the answer contains a denial of the material facts alleged as a cause of action in the complaint, and a special defense stated separately, the plaintiff is not entitled to a judgment on the pleadings, even if the entire cause of action is confessed in the special defense.<sup>6</sup> In a suit against a former administrator by his successor, who alleges a final settlement of the former's accounts, and a final decree as to his administration, a denial of these allegations is sufficient to prevent a judgment on the pleadings.<sup>7</sup> In a suit on a promissory note, a denial that anything remains due, coupled with an allegation of payment to original holder, without notice of an alleged assignment, raises an issue of fact, and judgment for plaintiff should not be given on the pleadings.<sup>8</sup> If plaintiff treats the denials as sufficient, and goes to trial and introduces evidence in support of his complaint, he can not afterwards move for judgment on the pleadings.<sup>9</sup>

<sup>3</sup> *Watson v. S. F. & H. B. R. R. Co.*, 50 Cal. 523.

<sup>4</sup> *Cal. State Tel. Co. v. Patterson*, 1 Nev. 151.

<sup>5</sup> *Newell v. Doty*, 33 N. Y. 83.

<sup>6</sup> *Nudd v. Thompson*, 34 Cal. 39; *Amador Co. v. Butterfield*, 51 id. 526.

<sup>7</sup> *Craig v. Bateman*, 49 Cal. 71.

<sup>8</sup> *Farmers & Mechanics' Bank v. Christensen*, 51 Cal. 571. Where the facts constituting a cause of action are specially admitted by the answer, a judgment may be entered against the defendant on the pleadings, notwithstanding the complaint contains an allegation of nonpayment and the answer denies it. *Esbensen v. Hoyer*, 3 Col. App. 467.

<sup>9</sup> *Tevlis v. Hicks*, 41 Cal. 123. As to what admissions are conclusive against the defendant, see *Burke v. Laforge*, 12 Cal. 403; *Fremont v. Seals*, 18 id. 433; *Mathews v. Fitch*, 22 id. 86, 229; 83 Am. Dec. 61; *Blood v. Light*, 31 Cal. 115; *Nunan v. San Francisco*, 38 id. 689; consult also "Admissions in the Answer," vol. 2, § 3177.

§ 4608. **Demurrer must be disposed of.** When a demurrer is filed to defendant's answer, it is irregular for plaintiff to take judgment before some disposition is made of the demurrer,<sup>10</sup> as the demurrer must be disposed of before the issue of fact is tried,<sup>11</sup> and before judgment on the merits can be rendered.<sup>12</sup> But if no objection is made at the time of trial, it is not such an irregularity as entitles the plaintiff to a new trial.<sup>13</sup>

§ 4609. **Discretion.** Motions for judgment on the pleadings are allowed in the discretion of the court.<sup>14</sup> Such motions can be allowed only where the answer wholly fails to deny any material allegation of the complaint.<sup>15</sup> Vagueness is not visited by judgment.<sup>16</sup>

<sup>10</sup> *Huse v. Moore*, 20 Cal. 115; *Calderwood v. Tevis*, 23 id. 335.

<sup>11</sup> *Ellis v. Loumier*, 1 Mo. 260.

<sup>12</sup> *Manifee v. D'Lashmutt*, 1 Mo. 258.

<sup>13</sup> *Calderwood v. Tevis*, 23 Cal. 335.

<sup>14</sup> *Fitzgerald v. Neustadt*, 91 Cal. 600; *Willson v. McDonald*, Cal. Sup. Ct., July Term, 1869.

<sup>15</sup> *Id.*; and see, to same effect, *Gardner v. Donnelly*, 86 Cal. 367; *McDonald v. Pincus*, 13 Mont. 83; *Wallace v. Baisley*, 22 Oreg. 572. A motion for judgment on the pleadings is not in harmony with the spirit of Code procedure, and is not favored. *Currie v. So. Pac. Co.*, 23 Oreg. 400. And when any of the material allegations of the complaint are denied by the answer, it is error to render judgment on the pleadings. *Willis v. Holmes*, 28 Oreg. 265; *Johnson v. Manning*, 2 Idaho, 1073; *Botty v. Vandament*, 67 Cal. 332; *Wildmer v. Martin*, 87 id. 88; *Hastings v. Bank of Longmont*, 4 Col. App. 419. But where a complaint states a cause of action, and proof of the affirmative averments in the answer would be immaterial, and the denials of the answer are merely of matters of law, it is proper to render a judgment for the plaintiff upon the pleadings. *Heydenfeldt v. Jacobs*, 107 Cal. 373; *Drew v. Pedlar*, 87 Cal. 443; *Simpson v. Prather*, 5 Oreg. 86. Motion by defendant for judgment upon the pleadings, when granted. See *Hinchman v. Oreg., etc., Nav. Co.*, 17 Oreg. 614; *De Toro v. Robinson*, 91 Cal. 371; *Kelley v. Kriess*, 68 id. 210. Where the complaint states facts sufficient to constitute a cause of action a motion by the defendant for judgment upon the pleadings can not properly be granted. *Denis v. Velati*, 96 Cal. 223; see *Dexter v. Sparkman*, 2 Wash. St. 165.

<sup>16</sup> *Kelly v. Barnett*, 16 How. Pr. 135. A motion for judgment on the pleadings ought not to be granted where material matters denied on information and belief were not presumptively within the knowledge of the defendants. *Wickersham v. Comerford*, 104 Cal. 494.

§ 4610. **Frivolous answer.** It seems that the plaintiff can not move for a judgment, as on a frivolous plea, unless the answer as an entirety is frivolous. If it contains several defenses, some well pleaded and some insufficient, the latter should be demurred to, or moved to be stricken out, as the case may be.<sup>17</sup> But if parts only are bad, relief is to be had by a motion to strike out. It is true that there may be no objection to combining both of these applications in one motion, but in that case, whether judgment on the whole answer can be granted must depend on whether the parts of the pleading objected to are stricken out, and if they are, whether the whole answer, as it then remains, be frivolous.<sup>18</sup> In an action to quiet title, an answer which denies that plaintiff is the owner or in possession of the property, except as tenant in common with defendant, and alleges that the deed set out in the plaintiff's complaint, and under which he claims, was not intended as a conveyance, but simply to enable him to sell the property, and that the grantor therein had subsequently conveyed an interest in the property to defendant, presents a defense, and plaintiff is not entitled to judgment on the pleadings.<sup>19</sup> When an answer sets up four defenses, two of which tendered issues with the complaint, and two of which in hypothetically admitting the averments of the complaint averred matter in avoidance, upon motion, it was held: 1. That the two hypothetical defenses must be stricken out; 2. That as there was enough left in the answer to put the plaintiff to proof of his case, it was unnecessary to allow an amendment.<sup>20</sup> Vagueness in pleading is not frivolousness, and is to be corrected by amendment.<sup>21</sup> As to what answers are deemed frivolous, consult section 3176 *et seq.*

<sup>17</sup> Van Valen v. Lapham, 13 How. Pr. 240.

<sup>18</sup> Lockwood v. Salhenger, 18 Abb. Pr. 136.

<sup>19</sup> Garvey v. Willis, 50 Cal. 619.

<sup>20</sup> Hamilton v. Hough, 13 How. Pr. 14.

<sup>21</sup> Kelley v. Barnett, 16 How. Pr. 135. A frivolous answer is one which denies no material averment in the complaint and sets up no defense, and when such an answer is filed the plaintiff may apply for judgment on the pleadings. Hemme v. Hays, 55 Cal. 337; and see Montgomery v. Merrill, 62 *id.* 385. When the complaint in the second action states a cause of action, and the answer contains no denials of its allegations, and rules wholly upon the bar of the former judgment, it is proper to render judgment against the defendant upon the pleadings. Johnson v. Vance, 86 Cal. 110.

**§ 4611. Election.** When the defendants serve a pleading containing matter in answer and matter in demurrer to the complaint, they should be compelled to elect between the two.<sup>22</sup> So where a demurrer to a plea is overruled, and the plaintiff does not obtain leave to withdraw it and file a replication, it amounts to an election to stand on the demurrer, and judgment should be rendered for the defendant.<sup>23</sup>

**§ 4612. Verified answer** A verified answer which in any part contains a distinct denial of a fact material to plaintiff's recovery can not, whatever its defects, be treated as a nullity, so as to entitle plaintiff to judgment on the pleadings.<sup>24</sup>

<sup>22</sup> *Slocum v. Wheeler*, 4 How. Pr. 373; *Struver v. The Ocean Ins. Co.*, 16 id. 422.

<sup>23</sup> *Marshall v. Platte Co.*, 12 Mo. 88.

<sup>24</sup> *Ghirardelli v. McDermott*, 22 Cal. 539. Technically, a motion for judgment upon the pleadings when there is a verified complaint and an unverified answer, is not good practice. The motion should be to strike the answer from the files and for judgment as by default. *Speer v. Oraig*, 16 Col. 478; *Tulloch v. Belleville, etc., Skein Works*, 17 id. 579.



# PART NINTH.

## TRIAL, AND ITS INCIDENTS.

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### CHAPTER I.

#### ISSUES.

§ 4613. **In general.** When the pleadings in an action (the complaint and answer) are made up, the question first to be arrived at before going into trial is, What are the issues to be tried? This proposition must be carefully examined and clearly understood before the parties can prepare for trial, for if the true issue or issues are not understood by counsel for the plaintiff or defendant, the one can not prepare intelligibly for the prosecution of his claim, nor the other for his defense. Certain steps are necessary to be taken on the part of the plaintiff to establish his claims against the defendant. The bare fact that the plaintiff has suffered an injury does not always entitle him to the relief asked for in his complaint; hence it becomes a question of chief importance to so frame the issue in the pleadings that he may obtain the relief to which the nature of the injury entitles him. He, being the moving party, must be prepared to so present his case that he can show: 1. That the defendant did the injury; 2. He must show the same character of injury which the complaint mentions; 3. The amount of the damage done, and that it is the same described in the complaint; 4. He must show that the issue made by the pleadings is sustained by the proofs — that is, he can not prove a cause of action not pleaded; and hence the familiar rule that the *allegata* and *probata* must agree. By issues is meant the fact of difference between plaintiff and defendant. In an action there may be a number of issues, each of which is vital and necessary to be tried to make out plaintiff's cause. They are integral parts of one whole, and if plaintiff fails to plead or prove each of these necessary parts, his action falls. Each is a link in the chain of circumstances, which makes up in detail the whole case. It is,

therefore, the better practice for an attorney to make a note of each step to be taken in the course of the trial before going into court, and to do that he must take for his guide the issue in the cause. This is necessary because the parties to the action, if informed of the facts necessary to be proved to make out their case, need only to bring into court such evidence as will effect the purpose, and not, as is often done, be firing at random, apparently without object, and certainly without success. In most causes, the real points will thus be greatly narrowed down, and it will require but a few witnesses or a comparatively small amount of evidence to sustain the action, if there be merit in it, and hence counsel should know before going into court, as far as possible, what he wants to prove; and second, if the whole issue is made up of parts, analyze them, and then make the proofs in the order in which they ought to be presented to the court or jury. In many cases it is of vast importance to present the proofs in logical order, which means the natural order, and this should be a point of no small interest to the practitioner, for if logically presented, unprofessional minds like jurors will grasp the ideas with more readiness, and the judge or professional listener will comprehend the relevancy of the testimony without comment or explanation.

**§ 4614. Joinder of issue.** The authorities generally define an issue to be a single, certain, and material point, issuing out of the allegations or pleas, consisting regularly of an affirmative and negative;<sup>1</sup> while an immaterial issue is one taken on an immaterial point, and not necessary to decide the action.<sup>2</sup> An issue is joined where there is a direct affirmation and denial of the fact in dispute; and it makes no difference whether the affirmative or the negative is first averred.<sup>3</sup> Where nothing is in fact controverted, no issue is joined.<sup>4</sup> The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by

<sup>1</sup> 2 Burr. Dict. 99; Co. Lit. 126 a; see 3 Bl. Com. 313; French Law, 336; Story's Eq. Pl., § 1; Steph. Pl. 124; 1 Van Santv. Pl. 733; 1 Chit. Pl. 652.

<sup>2</sup> Steph. Pl. 129; 1 Chit. Pl. 692; 2 Tidd's Pr. 921; Gould's Pl., c. 6, § 27.

<sup>3</sup> Van Gleson v. Van Gleson, 12 Barb. 520.

<sup>4</sup> Pardee v. Schenck, 11 How. Pr. 500. In a civil action the issues are formed by the averments of the complaint and denials of the answer or replication to new matter. Deer Lodge County v. Kohrs, 2 Mont. 66.

surprise, and that the jury may not be misled by the introduction of various matters.<sup>5</sup> The pleadings having been made up, the cause is at issue. An issue arises when a fact or conclusion of law is maintained by the one party and is controverted by the other. Issues are of two kinds: 1. Of law; and 2. Of fact.<sup>6</sup>

§ 4615. **Issues of law.** An issue of law arises upon a demurrer to the complaint or answer, or to some part thereof;<sup>7</sup> and is tried by the court, unless referred by consent.<sup>8</sup> A court can not properly, even by consent of parties, pass upon questions not raised by the written allegations of the pleadings.<sup>9</sup> Where an issue of law goes to only a portion of a pleading, the case may be put on the calendar for trial of the issue of fact, joined by other portions, without waiting for the decision of the former.<sup>10</sup> Various illustrations of issues of law are cited in the notes.<sup>11</sup> See, also, § 4617 *et seq.*

<sup>5</sup> *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46.

<sup>6</sup> Cal. Code Civ. Pro., § 588; N. Y. Code Civ. Pro., § 963.

<sup>7</sup> *Id.*, § 589; N. Y. Code Civ. Pro., § 964; Laws of Oregon, § 172; 3 Bl. Com. 314; 3 Steph. Com. 572.

<sup>8</sup> *Id.*, § 591; N. Y. Code Civ. Pro., § 969.

<sup>9</sup> *Boggs v. Merced M. Co.*, 14 Cal. 279.

<sup>10</sup> *Palmer v. Smedley*, 13 Abb. Pr. 185.

<sup>11</sup> *Account.*—What constitutes an account stated is a question raising an issue of law. *Lockwood v. Thorne*, 11 N. Y. 170; 62 Am. Dec. 81. *Adverse possession.*—The facts to establish adverse possession are to be found by the jury, but what constitutes adverse possession is a question of law. *Macklot v. Dubreuil*, 9 Mo. 473; 43 Am. Dec. 550; *Bowle v. Brahe*, 3 Duer, 35; *Jackson v. Walker*, 7 Cow. 637; *Munro v. Merchant*, 26 Barb. 383. *Agreement.*—Whether letters which have passed between parties constitute an agreement. *Luckhart v. Ogden*, 30 Cal. 547. Whether an agreement between parties amounts to an extension of time for the performance of a former contract between them, and, if so, what time, are questions of law for a court, and not of fact for a jury. *Id.* *Assignment.*—The legal effect of an assignment. *Goodrich v. Downs*, 6 Hill, 438; *Sheldon v. Dodge*, 4 Den. 217; *Cunningham v. Freeborn*, 11 Wend. 240; of a chattel mortgage. *Sples v. Boyd*, 1 E. D. Smith, 445; *Edgell v. Hart*, 9 N. Y. 213; 59 Am. Dec. 532— are questions of law. *Carelessness.*—What facts and circumstances constitute evidence of carelessness. *Gerke v. Cal. Steam Nav. Co.*, 9 Cal. 251; 70 Am. Dec. 650. *Compliance.*—Whether one claiming a discharge in insolvency has strictly complied with the provisions of the Insolvent Act is a question of law. *Schloss v. His Creditors*, 31 Cal. 201. *Contract.*—Whether a contract has been rescinded or not, as whether the undisputed acts of parties amount to a rescission. *Healy v. Utley*, 1 Cow. 345; or its construction. *Thomas*

§ 4616. **Issues of fact.** An issue of fact is an issue taken upon or consisting of matters of fact, the fact only, and not the law. *v. Dickinson*, 23 Barb. 431; and the validity and effect of a contract — are questions raising an issue of law. *Chapin v. Potter*, 1 Hilt. 366. But when the meaning is to be judged by facts *aliunde*, it is a question for the jury. *Gardner v. Clark*, 17 Barb. 538. **Due diligence.**— Due diligence is sufficiently defined to enable courts to determine whether any given state of facts is sufficient to constitute it or not. *Ophir Co. v. Carpenter*, 4 Nev. 534; 97 Am. Dec. 550; see *Carroll v. Upton*, 3 N. Y. 272. **Evidence.**— Admissibility of evidence is a question for the court. *People v. Glenn*, 10 Cal. 32; *Gould v. Weed*, 12 Wend. 12; compare *Larue v. Rowland*, 7 Barb. 107; see, also, *Harris v. Wilson*, 7 Wend. 57. Or of a witness objected to for interest. *Tabor v. Stanleys*, 2 Cal. 240. Or whether a witness is competent. *Reynolds v. Lounsbury*, 6 Hill, 534; *Scherpf v. Szadeczky*, 1 Abb. Pr. 366; *Prall v. Hinchman*, 6 Duer, 351. Or whether a paper is proper to be read. *Tillou v. Clinton & Essex Mut. Ins. Co.*, 7 Barb. 564. Whether evidence offered tends in any respect to make out fraud. *Gage v. Parker*, 25 Barb. 141; *Erwin v. Voorhees*, 26 id. 127. In slander, if there is no dispute as to the facts, the question whether the testimony given by plaintiff was material to the point in issue. *Power v. Price*, 16 Wend. 450. **Fraud.**— When there is no dispute upon the facts, and the law upon those facts declares a transaction fraudulent, it is not a question for the jury. *Chenery v. Palmer*, 6 Cal. 119; 65 Am. Dec. 493; *Sturtevant v. Ballard*, 9 Johns. 337; 6 Am. Dec. 281; *Jennings v. Carter*, 2 Wend. 446; 20 Am. Dec. 635; *Gage v. Parker*, 25 Barb. 141; *Erwin v. Voorhees*, 26 id. 127; *Edgell v. Hart*, 9 N. Y. 213; 59 Am. Dec. 532. **Grant.**— The construction of the terms of a grant. *Frier v. Jackson*, 8 Johns. 495; as to the validity and effect of a Mexican grant. *Seaward v. Malotte*, 15 Cal. 304; as to its loss and contents. *Id.*: as to the effect of mesne conveyance through which plaintiff claimed under the grant. *Id.* If there is no dispute about the facts, the question what premises are embraced by the terms of the instrument are questions for the court. *St. John v. Bumpstead*, 17 Barb. 100. **Insurance.**— Whether preliminary proofs of loss of vessel are sufficient to satisfy requirements of policy, and whether facts shown amount to a waiver of defects in the proofs, are questions for the court. *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith, 268. **Judgment.**— Whether a judgment was properly entered (*Leese v. Clark*, 28 Cal. 26) is a question of law; but the issue *nul tiel record* is for the jury. *Fasnacht v. Stehn*, 53 Barb. 650; 5 Abb. Pr. (N. S.) 338. **Jurisdiction.**— Whether the proceedings of the Probate Court showed jurisdiction to make certain orders is a question of law. *Seaward v. Malotte*, 15 Cal. 304. **Libel.**— Whether the article is libelous on its face is a question for the court. *Matthews v. Beach*, 5 Sandf. 256. But whether the language is capable of bearing the meaning assigned by the court, or whether the meaning is truly assigned to the language, is for the jury.

law, being disputed.<sup>12</sup> Such issues arise: 1. Upon a material allegation in the complaint, controverted by the answer; 2.

*Blagg v. Start*, 10 Q. B. 899; *Broome v. Goslen*, 1 C. B. 728; *Barrett v. Long*, 3 H. L. Cas. 395. *Mining laws*.—The construction of mining laws, when introduced in evidence, is a question for the court. *Fairbanks v. Woodhouse*, 6 Cal. 433. *Negligence*.—Where facts are ascertained, whether they amount to negligence. *Dascomb v. Buffalo & State Line R. R. Co.*, 27 Barb. 221; *Steves v. Oswego & Syracuse R. R. Co.*, 18 N. Y. 422; *Mackey v. New York Cent. R. R. Co.*, 27 Barb. 528; *Brooks v. Buffalo & Niagara R. R. Co.*, id. 532, note; *Brendell v. Buffalo State Line R. R. Co.*, id. 534, note. *New promise*.—Where the facts are undisputed, it is for the court to determine whether a sufficient promise has been made to take the case out of the statute. *Clarke v. Dutcher*, 9 Cow. 674. *Notice*.—The sufficiency of the notice of the dishonor of a note, where there is no dispute about the facts, is a question of law. *Cayuga Co. Bank v. Warden*, 6 N. Y. 29; *Farmers' Bank v. Vall*, 21 id. 487; 78 Am. Dec. 160. So, the question whether the notice was given within a reasonable time. *Bryden v. Bryden*, 11 Johns. 187; *Tindal v. Brown*, 1 T. R. 167; *Scheibel v. Fairbain*, 1 Bos. & Pul. 388. Or whether the holder used due diligence to find the drawer or indorser. *Bank of Utica v. Bender*, 21 Wend. 643; *Spencer v. Bank of Salina*, 3 Hill, 520. So whether a written notice of protest is sufficient in terms to charge an indorser. *Remer v. Downer*, 23 Wend. 620; 34 Am. Dec. 281; *Ransom v. Mack*, 2 Hill, 587; 38 Am. Dec. 602; *Dole v. Gold*, 5 Barb. 490; *Cook v. Litchfield*, 9 N. Y. 279. *Parties*.—The question as to proper parties plaintiff is a question of law. *Seaward v. Malotte*, 15 Cal. 304. *Partnership*.—If facts are undisputed, the question of partnership is for the court. *Cumpston v. McNair*, 1 Wend. 457. *Probable cause, reasonable cause*, are questions of law. 1 T. R. 542; 1 Gale & D. 504; *Bulkely v. Keteltas*, 6 N. Y. 384; *Carpenter v. Shelden*, 5 Sandf. 77; *Gordon v. Upham*, 4 E. D. Smith, 9; *Waldhelm v. Sichel*, 1 Hilt. 45; *Bulkeley v. Smith*, 2 Duer, 261; *Besson v. Southard*, 10 N. Y. 236; *McCormick v. Sisson*, 7 Cow. 715; *Pangburn v. Bull*, 1 Wend. 345; *Masten v. Deyo*, 2 id. 424; *Hall v. Suydam*, 6 Barb. 83; *Stevens v. Lacour*, 10 id. 62. Probable cause is a mixed question of law and fact. See *Potter v. Seale*, 8 Cal. 217; *Grant v. Moore*, 29 id. 644; *Brandt v. Higgins*, 10 Mo. 728. *Receipt*.—The facts being undisputed, and no fraud shown, the question of the effect of a receipt, as establishing an accord and satisfaction, is a question of law. *Vedder v. Vedder*, 1 Den. 257. *Waste*.—Whether the question what amounts to a waste is a question of law or fact. *Jackson v. Brownson*, 7 Johns. 227; 5 Am. Dec. 258; *Cooper v. Stower*, 9 id. 331; *Jackson v. Tibbetts*, 3 Wend. 341; *Kidd v. Dennison*, 6 Barb. 9; *McGregor v. Brown*, 10 N. Y. 114. *Written instrument*.—That a written instrument is or is not a mortgage. *Fairbanks v. Bloomfield*, 2 Duer, 353; the legal effect of written documents. *Carpentier v. Thirston*, 24 Cal. 268—are questions of law.

<sup>12</sup> 3 Bl. Com. 314; Co. Lit. 126 a; 3 Steph. Com. 572.

Upon new matters in the answer, except an issue of law is joined thereon.<sup>13</sup> In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference be ordered. In other cases, issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee.<sup>14</sup> They are made by the pleadings, and should be submitted to the jury as thus made.<sup>15</sup> The right of trial by jury is a right of which no litigant in a proper case can be deprived without his consent. And if the court refuses a demand for a jury trial of issues of fact in an action at law, it is an error for which the appellate court ought to grant a new trial, notwithstanding the issues have been fairly tried by the court, and proper judgment rendered.<sup>16</sup> Various illustrations of questions which raise an issue of fact are cited in the note.<sup>17</sup> See, also, § 4617 *et seq.*

<sup>13</sup> Cal. Code Civ. Pro., § 590; see, also, N. Y. Code Civ. Pro., § 964; Laws of Oregon, § 173.

<sup>14</sup> *Id.*, § 592. The question whether an issue of fact must be tried by a jury or by the court is not to be determined from the nature of the issue, but from the character of the action in which issue is joined. *Danielson v. Gude*, 11 Col. 87.

<sup>15</sup> *Bankston v. Farris*, 26 Mo. 175; *Overton v. Webster*, *id.* 332.

<sup>16</sup> *Treadway v. Wilder*, 12 Nev. 108. In an equitable action, the issues of fact raised by the pleadings should be tried by the court, unless submitted by the court to a jury. *McLaughlin v. Del Re*, 64 Cal. 472; *Churchill v. Baumann*, 104 *id.* 369; *Santa Cruz, etc., Co. v. Bowie*, 104 *id.* 286; see § 4633, *post*.

<sup>17</sup> *Abandonment*.—When, in ejectment on prior possession, abandonment is pleaded, and evidence on it is introduced, the question of adverse possession is for the jury. *Roberts v. Unger*, 30 Cal. 676; *Jackson v. Joy*, 9 Johns. 102. So of mining claims. *Warring v. Crow*, 11 Cal. 371. So whether an abandonment of insured vessel is accepted or not. *Bell v. Smith*, 2 Johns. 98. *Appurtenances*.—What are appurtenances of a steamboat is a question of fact for the jury. *Amis v. Steamboat "Louisa,"* 9 Mo. 621. *Assent*.—Whether a party has assented to acts of the sheriff. *Moore v. Westervelt*, 2 Duer, 59. So knowledge or assent, generally, is a question of fact. *Weaver v. Page*, 6 Cal. 681; *Bensley v. Atwill*, 12 *id.* 231. *Baggage*.—Whether articles of a doubtful character are to be deemed as baggage is a question of fact. *Grant v. Newton*, 1 E. D. Smith, 95. *Bill of exchange*.—That a bill was presented for payment, and payment demanded, is a question of fact. *Graham v. Machado*, 6 Duer, 514. *Compensation*.—In a suit for services

§ 4617. **Mixed issues of law and fact.** Where there are issues both of law and fact to the same complaint, it is required rendered, whether such services were intended to be gratuitous is a question for the jury. *Pendleton v. Empire Stone Dressing Co.*, 10 N. Y. 13. *Compulsion.*—The question of compulsion in the ejection of a passenger from a railroad car is one for the jury. *Kline v. C. P. R. R. Co.*, 37 Cal. 400; 99 Am. Dec. 282; S. C., 39 Cal. 587. *Conversion.*—The time of the conversion. *Hyde v. Stone*, 9 Cow. 230; 18 Am. Dec. 501; and the amount of damages in action for the detention of personal property. *Bartlett v. Hogden*, 3 Cal. 55 — are questions for the jury. *Custom.*—Whether such a custom existed or not is a question of fact. *Panaud v. Jones*, 1 Cal. 500. *Death of parties.*—Where the death of one of the defendants is put in issue by the pleadings, it should, like every other issue of fact, be left to the jury. *Fowler v. Houston*, 1 Nev. 469. *Dedication.*—What amounts to a dedication of homestead is a question of fact. *Cook v. McChristian*, 4 Cal. 23. So of the dedication of land for a street. *Harding v. Jasper*, 14 Cal. 648; see *Aleman v. Petaluma*, 38 id. 553. *Delivery of goods.*—Whether absolute or conditional, is a question of fact. *Houghtaling v. Ball*, 19 Mo. 84; 59 Am. Dec. 331; *Fleeman v. McKean*, 25 Barb. 474; *Downer v. Thompson*, 6 Hill, 208. *Description of land.*—Whether the land, as described in the deed given in evidence, is the same as that described in the plaintiff's declaration, is a question for the jury. *Lawless v. Newman*, 5 Mo. 236; *Newman v. Lawless*, 6 id. 279. So where parol evidence is resorted to to identify the calls of a survey, the facts must be found by the jury. *Ott v. Soulard*, 9 Mo. 573. *Diligence and care* is a question of fact for the jury. *Richmond v. Sac. Val. R. R. Co.*, 18 Cal. 351. Ordinary care. *Aymar v. Astor*, 6 Cow. 267. *Election or intention* is a question of fact for the jury. *Clift v. White*, 12 N. Y. 538; *Moss v. Riddle*, 5 Cranch, 351; *Griffin v. Cranston*, 1 Bosw. 281; *Miller v. The People*, 5 Barb. 203; 20 id. 549; *Gilman v. Reddington*, 24 N. Y. 12. *Evidence.*—The weight of evidence is a question for the jury. *Battersby v. Abbott*, 9 Cal. 565; *Winston v. Wales*, 13 Mo. 569; *Patterson v. McClanahan*, id. 507; *Van Ness v. Packard*, 2 Pet. 138; *People v. Dick*, 32 Cal. 213; S. C., 34 id. 663; *Tuttle v. Buck*, 41 Barb. 417. Whether evidence is sufficient to prove execution of a bond. *Hicks v. Chouteau*, 12 Mo. 341. It is for the jury, and not the court, to construe the meaning of an ambiguous reply to a question in a deposition. *Marine Ins. Co. of Alex. v. Young*, 5 Cranch, 187. *Fixtures.*—Whether personal property has been annexed to the freehold, or whether it was so annexed for the purposes of trade only, is a question of fact. *Hovey v. Smith*, 1 Barb. 372. *Foreign law.*—What is the law of a foreign country is a question of fact. *Western v. Genesee Mutual Insurance Co.*, 12 N. Y. 258. *Fraud.*—Actual fraud is always (Cal. Code Civ. Pro., § 1574) a question of fact. *Seaman v. Mariani*, 1 Cal. 336; *Billings v. Billings*, 2 id. 107; 56 Am. Dec. 319; *Ford v. Chambers*,



19 Cal. 143; *Wellington v. Sedgwick*, 12 id. 469. Whether omission to change possession under sale or mortgage of chattels was with fraudulent intent. *Prentiss v. Slack*, 1 Hill, 467; *Butler v. Van Wyck*, id. 438; *Smith v. Acker*, 23 Wend. 653; *Stewart v. Slater*, 6 Duer, 83; *Gardner v. McEwen*, 19 N. Y. 123; *Groat v. Rees*, 20 Barb. 26; compare *Edgell v. Hart*, 9 N. Y. 213; 59 Am. Dec. 532. The question whether a mortgage given for a greater sum than is due was given in good faith, both for a present indebtedness and to secure future advance to be made, is one of fact for the jury, under proper instructions from the court. *Tully v. Harloe*, 35 Cal. 302; 95 Am. Dec. 102. It is only on proof of a good consideration that the cause goes to the jury on the question of fraud in fact. *Allen v. Cowan*, 28 Barb. 99. In an action to obtain chattels purchased at a sale on execution, the questions whether there was an intent to defraud creditors, whether the property was in view of the bidders, whether it was offered in judicious lots, are questions of fact. *Bruce v. Westervelt*, 2 E. D. Smith, 440. Whether the transfer of the interest of a partner to his copartner was made with intent to defraud creditors. *Griffin v. Cranston*, 1 Bosw. 281. Fraud in the procurement of an entry of land in a contest between two claimants from the United States. *Waller v. Von Phul*, 14 Mo. 84—are questions of fact. *Grant*.—The question what premises are embraced in a grant depending on evidence outside the grant, identity of landmarks referred to is for the jury. *Frier v. Jackson*, 8 Johns. 496. *Instigation and request* are questions of fact. *Ives v. Humphreys*, 1 E. D. Smith, 200. *Insurance*.—Whether circumstances not communicated to the insurer, on application for a policy, were material to the risk, and necessary to be communicated. *Firemen's Ins. Co. v. Walden*, 12 Johns. 513; 7 Am. Dec. 340; *Livingston v. Delafield*, 1 Johns. 522; *Burritt v. Saratoga Co. Mut. Ins. Co.*, 5 Hill, 188; 40 Am. Dec. 345; *Gates v. Madison Co. Mut. Ins. Co.*, 2 N. Y. 43; the length of time usual for a vessel to perform a voyage. *Mackay v. Rhineland*, 1 Johns. Cas. 408; whether vessel was lost within the time fixed in the policy. *Brown v. Neilson*, 1 Cal. 525; whether the preliminary proofs were furnished of the loss, or whether the acts were done which are relied on as constituting a waiver of defects in the proofs. *Miller v. Eagle Life & Health Ins. Co.*, 2 E. D. Smith, 268; whether erecting additional buildings increases the risk. *Grant v. Howard Ins. Co.*, 5 Hill, 10; whether keeping a small quantity of tow in a building amounts to using it for storing flax. *Hynds v. Schenectady Co. Mut. Ins. Co.*, 16 Barb. 119; affirmed in 11 N. Y. 564—are questions for the jury. *Libel*.—The truth of a libel is a question for the jury. *King v. Root*, 4 Wend. 113; 21 Am. Dec. 102. Whether or not libelous articles is applicable to the plaintiff. *Green v. Telfair*, 20 Barb. 11. The true interpretation of an ambiguous libel is a question for the jury; but if, upon an examination of the whole writing and comparison of its different parts, it appears to admit of no just construction except one injurious to the plaintiff, its meaning is



to be determined by the court. 9 Barn. & Cress. 643; 10 id. 472; 5 Johns. 211; 4 Am. Dec. 339; Lewis v. Chapman, 16 N. Y. 369; see *ante*, § 1697. *Malice* is a question of fact for the jury. Potter v. Seale, 8 Cal. 217; Bulkeley v. Smith, 2 Duer, 261. *Necessaries*.—Necessaries or not necessaries may be a mixed question of law and fact. Wharton v. McKenzle, 5 Q. B. 606. But what constitutes necessary furniture is a question of fact for the jury. Wilson v. Ellis, 1 Den. 462. *Negligence*.—Where facts are disputed, the question of negligence is for the jury. Richmond v. Sac. Val. R. R. Co., 18 Cal. 351; Bernhardt v. Rensselaer R. R. Co., 23 How. Pr. 166; Buckingham v. Payne, 36 Barb. 81; Mangam v. Brooklyn R. R. Co., id. 237; Foot v. Wiswall, 14 Johns. 304; Moore v. Westervelt, 21 N. Y. 103. *Nuisance*.—Whether obstructions amount to a nuisance. Gunter v. Geary, 1 Cal. 467; Blanc v. Klumpke, 29 id. 156; City of San Francisco v. Clark, 1 id. 386; but see Fire Department v. Harrison, 9 Abb. Pr. 1; S. C., 18 How. Pr. 181; Brown v. Mohawk & Hudson River R. R. Co., How. App. Cas. 52, 66. In an action for obstructing access to plaintiff's lot, the question whether the obstruction was carried to an unnecessary or unreasonable degree, or was continued for an unreasonable length of time, are questions of fact. St. John v. Mayor of New York, 6 Duer, 315. But the question of a flagrant nuisance is a mixed question of law and fact. Hentz v. Long Island R. R. Co., 13 Barb. 647, 657. *Notice*.—Whether notice has been served or not. Jackson v. Livingston, 3 Johns. 455; whether a notice referred to the same note, and was so understood by the indorser. Reedy v. Seixas, 2 Johns. Cas. 337; Ontario Bank v. Petrie, 3 Wend. 456; Bank of Rochester v. Gould, 9 id. 279; whether indorser was misled. McKnight v. Lewis, 5 Barb. 681; see Clark v. Dearborn, 6 Duer, 309— are questions of fact. *Partnership*.—Whether a partnership existed, what must be the firm name, and whether note was given for partnership transactions, are questions for the jury. Drake v. Elwyn, 1 Cal. 184. So of notice of dissolution of partnership. Rabe v. Wells, 3 Cal. 151; Treadwell v. Wells, 4 id. 260. *Payment*.—Whether acceptance of a part payment is intended by the creditor to be in full or not. Pierce v. Pierce, 25 Barb. 243; where there is a conflict of evidence, the question whether a note was received in payment. Atlantic Fire & Marine Ins. Co. v. Boies, 6 Duer, 583; Johnson v. Weed, 9 Johns. 310; whether money forwarded to acceptor by indorsee through drawer was rendered as a payment so as to discharge acceptor. Bean v. Canning, 2 E. D. Smith, 419; whether a promissory note was received as payment. Myatts v. Bell, 41 Ala. 222— are questions for the jury. *Pre-emption*.—Whether acts have been performed giving a person the rights of pre-emption is a question of fact. Megerle v. Ashe, 33 Cal. 74; see, also, Toland v. Mandell, 38 id. 30. *Principal and agent*.—Whether the credit was given to the agent or his principal is a question of fact for the jury. Hovey v. Pitcher, 13 Mo. 191. Whether an agent acted within the scope of his authority is a question of fact. Taylor v. Labeaume, 14 id. 572;

**McMorris v. Simpson**, 21 Wend. 610. Where goods were sent by a commission merchant to agents, it is for the jury to decide whether such agents were the agents of the commission merchant or the owner of the goods. **Pomeroy v. Sigerson**, 22 Mo. 177. The authority of an agent (**Thurman v. Wells**, 18 Barb. 500) is a question for the jury. *Prior appropriation.*—Priority in the appropriation of water is a question of fact for the jury. **Weaver v. Eureka Lake Co.**, 15 Cal. 274. *Prior possession.*—The question as to whether a settler on the public land has proceeded with reasonable diligence to follow up his location with the necessary improvements, so as to recover against a subsequent possessor, is a question of fact for the jury. **Staininger v. Andrews**, 4 Nev. 59; **Sharon v. Davidson**, id. 416. *Private way.*—Whether the change in a private way was by agreement or not, and whether it was to be permanent, are questions of fact. **Hamilton v. White**, 4 Barb. 60; affirmed, 5 N. Y. 9. *Prohibited sale.*—Whether a sale was made in good faith, or was an invasion of a prohibiting statute, is a question of fact. **Baker v. Richardson**, 1 Cow. 77; **Suydam v. Morris Canal & Banking Co.**, 6 Hill, 217. *Reasonable search.*—Whether or not reasonable search has been made for lost document is a question of fact. **Clark v. Owens**, 18 N. Y. 435. *Reasonable use.*—Reasonableness of the use of water is a question for the jury. **Hetrich v. Deachler**, 6 Penn. St. 32; **Esmond v. Chew**, 15 Cal. 143; **Thomas v. Brackney**, 17 Barb. 654. *Reputed ownership* is a question of fact for the jury. **Edwards v. Scott**, 1 Man. & G. 962; S. C., 2 Scott's N. R. 266. *Sale.*—Whether a sale was completed or not is a question for the jury. **De Ridder v. M'Knight**, 13 Johns. 294. Also, whether a party assented to a sale under execution where property was sold of which he was joint owner. **Fiero v. Betts**, 2 Barb. 633. *Seaworthy or not* is a question of fact for the jury. **Sherwood v. Ruggles**, 2 Sandf. 55; **Patrick v. Hallett**, 1 Johns. 241; **Clifford v. Hunter**, 3 Car. & P. 16; **Walsh v. Wash. Mar. Ins. Co.**, 32 N. Y. 427. *Special agreement.*—Whether there was a special agreement by which the original demand sued on was extinguished by note or receipt in full is a question of fact. **Steamboat Charlotte v. Hammond**, 9 Mo. 58; 43 Am. Dec. 536. *Trespass.*—Where possession is proved, it is for the jury to determine whether acts of the defendant of which evidence is given amount to a trespass. **Perry v. Block**, 1 Mo. 484. The amount of damages in actions of trespass is a question of fact for the jury. **Drake v. Palmer**, 4 Cal. 11. *Warranty.*—The question whether words used by a seller of chattels amount to a warranty. **Duffee v. Mason**, 8 Cow. 25; **Rogers v. Ackerman**, 22 Barb. 134; whether defect in the property sold was greater than that excepted in the vendor's warranty. **Wade v. Scott**, 7 Mo. 509; sound or unsound. **Lewis v. Peake**, 7 Taunt. 153 — are questions of fact. *Written instruments.*—It is the province of the court to construe written instruments, but where they are adduced as containing evidence of facts, the jury are authorized to draw such inferences from them as they may deem warranted. **Primm v. Haren**, 27 Mo. 205. The construction

that the issues of law be first disposed of by the court.<sup>18</sup> When there is both a demurrer and an answer to the same complaint, the issue of law raised by the demurrer must be first disposed of.<sup>19</sup> Where the law applicable to a case has been altered by the Legislature pending the action, the court will dispose of issues of law arising on a demurrer according to the law at the time of the trial of the issues, if it does not appear upon the face of the complaint when the action was commenced.<sup>20</sup> When the answer contains legal and equitable defenses, the court may first try the equitable defense, and refuse plaintiff a jury trial, and if the facts warrant, grant the equitable relief prayed for.<sup>21</sup> It should distinctly appear from the record that the equitable defenses were first tried and disposed of, or if the whole action and all the issues were tried and submitted together, the fact should appear.<sup>22</sup> But the objection that an equitable defense was not first disposed of can not be raised for the first time on appeal.<sup>23</sup> Where there are both issues of fact and of law, and the former have been first tried, it will be presumed that the court so directed, if nothing appears to show that objection was made at the time of the trial.<sup>24</sup> An answer

and true interpretation of commercial correspondence may under proper circumstances be left to the jury. *Fagin v. Connolly*, 25 Mo. 94; 69 Am. Dec. 450; or when an undated instrument was made. *Coons v. Chambers*, 1 Abb. Pr. 165. It is for the jury to determine whether the note tendered in part payment for a horse was the note understood and intended by the parties in their contract. *Fenton v. Perkins*, 3 Mo. 23, 144. Whether an indorsement on a note has been erased. *Swan v. O'Fallon*, 7 Mo. 231; whether an alteration appearing upon the face of an agreement was made before or after its execution. *Prindle v. Chambers*, 1 Abb. Pr. 58; *Maybee v. Sniffen*, 2 E. D. Smith, 1. The question of the identity of a written instrument is for the jury. *Jackson v. Betts*, 6 Cow. 377; *Bank of Cape Fear v. Gomez*, id. 435.

<sup>18</sup> Cal. Code Civ. Pro., § 592; N. Y. Code Civ. Pro., § 966; Laws of Oregon, § 174; and see *Hennequin v. Butterfield*, 76 N. Y. 598; *Swasey v. Adair*, 88 Cal. 179.

<sup>19</sup> *Brooks v. Douglass*, 32 Cal. 208. Issues of law are waived after a trial upon the facts. *Marden v. Wheelock*, 1 Mont. 49; *Orr v. Haskell*, 2 id. 225.

<sup>20</sup> *Smith v. Holmes*, 19 N. Y. 271; *Lewis v. City of Buffalo*, 29 How. Pr. 335.

<sup>21</sup> *People v. Lafarge*, 3 Cal. 130; *Bodley v. Ferguson*, 30 id. 511.

<sup>22</sup> *Martin v. Zellerbach*, 38 Cal. 319; 99 Am. Dec. 365.

<sup>23</sup> *Tormey v. Pierce*, 42 Cal. 338.

<sup>24</sup> *Fry v. Bennett*, 9 Abb. Pr. 45.

in forceful detainer which denies that defendant "unlawfully entered" admits the entry, and raises an issue only on its lawfulness."<sup>25</sup> Various illustrations of mixed issues of law and fact are cited in the note.<sup>26</sup>

**§ 4618. Special issues.** A special issue is one produced upon a special plea,<sup>27</sup> and is usually more specific and particular than the general issues.<sup>28</sup> A question of fact not put in issue by the pleadings may be tried by a jury, upon an order for the trial, stating distinctly and plainly the question of fact to be tried; and such order is the only authority necessary for a trial.<sup>29</sup> The court may direct an issue to be framed upon the pleadings and submitted to the jury.<sup>30</sup> But it is not a matter of right in equity cases.<sup>31</sup> And such special issues framed by the court according to chancery practice may be tried by a jury in equity cases.<sup>32</sup> But where several defenses, some legal and some equitable, are interposed, it is irregular for the court to frame special issues involving all these, and submit them together to a jury.<sup>33</sup> When, upon the coming in of the report of an auditor, either party desires to try the case by a jury, if there has not been an issue of fact joined between the parties, suitable issues should be made up under the direction of the court.<sup>34</sup> The proper mode of making up such an issue is for the party having the

<sup>25</sup> *Leroux v. Murdock*, 51 Cal. 541.

<sup>26</sup> *Association*.—That the company was illegally associated is a mixed question of law and fact. *Ransford v. Copeland*, 6 Ad. & El. 482. *Delivery and change of possession*. *Vance v. Boynton*, 8 Cal. 554. *Insolvency*.—The question of the insolvency of the maker of a promissory note, not negotiable under the statute, in suit against the indorser. *Pococke v. Blount*, 6 Mo. 338. *New promise*.—Where there is a dispute as to the facts, whether a sufficient promise has been made to take the case out of the statute. *Clarke v. Dutcher*, 9 Cow. 675.

<sup>27</sup> Steph. Pl. 162.

<sup>28</sup> Id.

<sup>29</sup> Cal. Code Civ. Pro., § 309.

<sup>30</sup> *Curtis v. Sutter*, 15 Cal. 263.

<sup>31</sup> *Moffat v. Moffat*, 10 Bosw. 468; *Moffat v. Mount*, 17 Abb. Pr. 4; *McCarty v. Edwards*, 24 How. Pr. 236. The submission to the jury of special issues is within the discretion of the court, and the refusal of the court to grant a request therefor is not the subject of an exception. *Smith v. Steamship Co.*, 99 Cal. 462.

<sup>32</sup> *Brewster v. Bours*, 8 Cal. 505.

<sup>33</sup> *Weber v. Marshall*, 19 Cal. 447.

<sup>34</sup> *Brewer v. Hyndman*, 18 N. H. 9.

affirmative to file an allegation of the facts which he asserts, and for the other party to traverse it. It is not a proper course for a party to traverse the conclusions of the auditor.<sup>35</sup> When, in a suit on a promissory note, one of the issues is whether or not the plaintiff is the owner and holder, and special issues are submitted to the jury, which do not constitute a defense if the plaintiff is such owner and holder, and the jury find on the special issues only, it is error to render judgment for the plaintiff, until there is a finding on the issue of ownership.<sup>36</sup>

<sup>35</sup> *Brewer v. Hyndman*, 18 N. H. 9.

<sup>36</sup> *Kiel v. Reay*, 50 Cal. 61.

## CHAPTER II.

### TRIAL IN GENERAL.

§ 4619. **In general.** After the complaint and answer are filed in the action, and all demurrers, motions to strike out, to amend the complaint or answer, and all other incidental motions are disposed of, the cause is at issue and ready for trial. All actions are tried in one of three ways: 1. If it be an action at law, and a jury is not waived, it will be tried by a jury; 2. All equity actions are tried by the court; 3. Trial by referee, which is generally done by consent of counsel, and order of reference being made in pursuance of such consent.<sup>1</sup> It is not within the scope of this work to go beyond the plain letter of the law relative to any matter of pleading or of practice. Yet the question of properly and safely trying causes is one of much importance. Experience has taught the profession that there are really but two avenues open for success at the bar relative to the practice of the law: the one is to get correctly into court, the other is to get safely out of court; in other words, one is to draw the pleadings correctly, and the other to properly present the facts of the case and preserve all the legal rights of the party represented in the course of the trial. In either branch, the evidence of success is the result. By result is meant the final result; for it is one thing to win a cause, and quite another thing to win it and yet keep the record free from error, so that on appeal the judgment below will not be reversed. Remote as well as immediate consequences must be guarded against. He who tries his cause with the sole idea of gratifying the prejudices of listening friends, or of tickling the ears of unlearned jurors, often in the end loses what a more careful and less ornate display might have secured to his client.

<sup>1</sup> See Cal. Code Civ. Pro., § 592; § 4709, *post*. A trial is an examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. *Tregambo v. Mining Co.*, 57 Cal. 501; *Finn v. Spagnoli*, 67 *Id.* 330.

§ 4620. **Duties of clerk.** The clerk must enter all causes on the calendar of the court according to the date of issue. Causes once placed on the calendar, for a General or Special Term, if not tried or heard at such term, must remain upon the calendar from court to court until finally disposed of.<sup>2</sup> Counsel have a right to rely on the presumption that the causes upon the calendar will be heard in their regular order, and to act upon that belief in calculating how long they will have for preparation.<sup>3</sup> The clerk must keep, among the records of the court, a register of actions. He must enter therein the title of the action, with brief notes under it, from time to time, of all papers filed, and proceedings had therein.<sup>4</sup> When a jury is waived, and the whole case is tried before the court, the record should show whether the trial was confined to the equitable defenses alone, or included all the defenses in the cause. It should distinctly appear that the equitable defenses were first tried and disposed of, or if all the issues were tried and submitted together, that fact should appear. In the natural order, it is the duty of the court first to try and decide upon the equitable defense before proceeding with the action at law. So held in an action where the judgment enjoined the plaintiff from setting up a particular title, without finally deciding the title or right of possession of the parties to the land in controversy.<sup>5</sup>

§ 4621. **Continuance.** The cause having come on for trial, one of the parties, not being ready for such trial, can move the court, upon affidavit, for a continuance on any one of the following grounds: 1. Absence of witnesses or witness; 2. For any other reason which would, if the case were forced to trial, be subversive of the ends of justice — *e. g.*, sickness of counsel, or of the parties, or a party to the action, etc.

Courts usually require, and ordinarily should require, a showing to be made by affidavits, in order to continue causes for the term, when such continuance is objected to by either party; but when a state of affairs exists that is notorious, and about which there could be no conflict (*e. g.*, the destruction by fire of so much of the city where the court was held, as to render it

<sup>2</sup> Cal. Code Civ. Pro., § 593.

<sup>3</sup> Belmont v. Erie R. R. Co., 52 Barb. 637.

<sup>4</sup> Cal. Code Civ. Pro., § 1052.

<sup>5</sup> Martin v. Zellerbach, 38 Cal. 300; 99 Am. Dec. 365.

impossible to find a suitable room in which the court could meet), the court is authorized of its own motion to continue the causes for the term.<sup>6</sup> The granting or refusing a continuance is in the sound discretion of the court, and not subject to review, except in cases of gross abuse of that discretion.<sup>7</sup> They are extremely liberal in granting adjournments.<sup>8</sup> It is error to refuse a continuance when a good cause is shown.<sup>9</sup> But even where the action of the court in refusing a continuance approaches an arbitrary exercise of discretion, the proper course of the party is to move for a new trial.<sup>10</sup> And the only way of presenting an order refusing a continuance for review is by bill of exceptions.<sup>11</sup> A continuance relating back may be entered at any time to effect the purposes of justice.<sup>12</sup>

<sup>6</sup> *Ex parte Larkin*, 11 Nev. 90.

<sup>7</sup> Consult the following authorities on the subject: *Frank v. Brady*, 8 Cal. 47; *Musgrove v. Perkins*, 9 id. 211; *Pilot Rock Creek Canal Co. v. Chapman*, 11 id. 161; *People v. Gaunt*, 23 id. 156; *Griffin v. Polhemus*, 20 id. 180; *Hastings v. Hastings*, 31 id. 95; *Harper v. Lamping*, 33 id. 641; *Carey v. P. & C. Petroleum Co.*, id. 604; *Freleigh v. State*, 8 Mo. 606; *Scogin v. Hudspeth*, 3 id. 123; *Chambers v. Lane*, 5 id. 289; *Beatty v. Sylvester*, 3 Nev. 228; *Choat v. Bullion Min. Co.*, 1 id. 73; *Ogden v. Payne*, 5 Cow. 15; *Barker v. Haskell*, 9 Cush. 218; *Leggett v. Boyd*, 3 Wend. 376; *Congar v. Galena, etc., R. R. Co.*, 17 Wis. 477; *Gaines v. White*, 1 S. Dak. 434; *Life Ins. Co. v. Gisborne*, 5 Utah, 319; *Dawson v. Coston*, 18 Col. 483; *Kneebone v. Kneebone*, 83 Cal. 645; *Barnes v. Barnes*, 95 id. 171; *Berger v. Harrison*, 1 Overt. 483; *Baumberger v. Arff*, 96 Cal. 621; *Young v. Patton*, 9 Oreg. 195; *Dupont v. McAdow*, 6 Mont. 226; *Catlin v. Harris*, 7 Wash. St. 542; *Zellinsky v. Price*, 8 id. 256; *Evans v. Bolling*, 5 Ala. 550; *Planters & Merchants' Bank v. Walker*, 7 id. 926; *Dulany v. Boston*, 2 Harr. (Del.) 350; *Campbell v. Strong*, *Hempst.* 265; *McCracken v. Church*, 1 A. K. Marsh. 273; *People v. Lewis*, 64 Cal. 401; *Alden v. Carpenter*, 1 West Coast Rep. 598; *Fleming v. Hawley*, 65 Cal. 492.

<sup>8</sup> *Turner v. Morrison*, 11 Cal. 21.

<sup>9</sup> *Moore v. McCulloch*, 6 Mo. 444; *Tunstall v. Hamilton*, 8 id. 500.

<sup>10</sup> *Pilot, etc., Co. v. Chapman*, 11 Cal. 161.

<sup>11</sup> *Jacks v. Buell*, 47 Cal. 162; *People v. Ashnauer*, id. 98; *Land & Town Co. v. Patton*, 21 Col. 503.

<sup>12</sup> *Sheppard v. Wilson*, 6 How. (U. S.) 260.



## § 4622. Affidavit for continuance.

*Form No. 1130.*

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says:

I. That he is the defendant in the above-entitled action.

II. That he has fully and fairly stated the case in this action to E. F., his counsel, who resides at [state residence of counsel], and after such statement, he is advised by his said counsel, and verily believes, that he has a good and substantial defense to said action on the merits.

III. That he can not safely go to trial at this term of this court on account of the absence of ..... and ....., who are material witnesses for defendant.

IV. That subpoenas in said cause were duly issued by the clerk of this court, and by this defendant placed in the hands of ....., the sheriff of said county, on the ..... day of ....., 18.., for service on said ..... and .....

V. That on the ..... day of ....., 18.., said subpoenas were personally served on the said ..... and ....., in said county.

VI. That said subpoenas required the said witnesses to be present in the court at the hour of ..... o'clock, A. M., of this the ..... day of ....., 18.., to testify on behalf of defendant.

VII. That the evidence of each of said witnesses is material for defendant's defense.

VIII. That he will prove by said witnesses [here state the evidence each will give, naming him.]

IX. The said facts, which defendant can prove by said witnesses, can not, to his knowledge, be proved by any other persons.

X. This application is not made for delay merely but that justice may be done in the premises, and affiant verily believes that if this cause be continued for this term of this court, he will be able to have the said witnesses present at the next term thereof.

[JURAT.]

[SIGNATURE.]<sup>18</sup>

<sup>18</sup> As to the postponements in Justices' Courts, see Cal. Code Civ. Pro., §§ 873-877. No notice of an application for continuance is generally given; the application is generally made when the cause comes on for trial; sometimes, however, the application is made

**§ 4623. Affidavit must state:** 1. That the evidence designed to be obtained is material;<sup>14</sup> 2. That the evidence designed to be obtained is not cumulative, or that affiant can not prove the same matters by other witnesses;<sup>15</sup> 3. That he can not safely proceed to trial without his evidence;<sup>16</sup> 4. The affidavit should show that there is a reasonable prospect of obtaining the testimony at some future time;<sup>17</sup> an affidavit which states that the applicant knows of no witnesses in the state by whom the material facts can be proved is insufficient;<sup>18</sup> 5. That due diligence has been used to procure the witness,<sup>19</sup> and the character of that diligence,<sup>20</sup> and also that the witness can not be readily reached by attachment;<sup>21</sup> and the court may also require the moving party to state on affidavit the evidence which he expects to ob-

before the day of trial, so that no preparation for trial need be made. Affidavits for a continuance on the ground of absence of witnesses should be made by the defendant himself, or by some one else who has direct knowledge of the facts. *People v. Jenkins*, 56 Cal. 4.

<sup>14</sup> Cal. Code Civ. Pro., § 395; *Hawley v. Stirling*, 2 Cal. 470; *Berry v. Metzler*, 7 id. 418; *Harper v. Lamping*, 33 id. 641; *People v. Williams*, 43 id. 344; *Kern Valley Bank v. Ohester*, 55 id. 49; *Storch v. McCain*, 85 id. 304; *Dawson v. Coston*, 18 Col. 493; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Bruton v. State*, 21 Tex. 337; *McDonald v. Smith*, 21 Ark. 460; *Fake v. Edgerton*, 6 Duer, 653. An affidavit for a continuance on account of the absence of a party under section 594, California Code of Civil Procedure, need not show the materiality of the evidence expected to be obtained. *Jaffe v. Lillenthal*, 101 Cal. 175.

<sup>15</sup> *People v. Quincy*, 8 Cal. 89; *People v. Jenkins*, 56 id. 4; *Pierce v. Payne*, 14 id. 419; *People v. Gaunt*, 23 id. 156; *Pope v. Dalton*, 31 id. 218; compare *People v. Ah Lee Doon*, 97 id. 171.

<sup>16</sup> *Harrell v. Durrance*, 9 Fla. 490.

<sup>17</sup> *Richardson v. People*, 31 Ill. 170; *Harper v. Lamping*, 33 Cal. 641; *People v. Ashnauer*, 47 id. 98; *People v. Cleveland*, 49 id. 577; *State v. Rosemurgey*, 9 Nev. 308. It is not error to refuse continuance on account of absence of witness, when it does not appear that the attendance of the witness can be procured in a reasonable time. *People v. Lewis*, 64 Cal. 401; and see *Dawson v. Coston*, 18 Col. 493.

<sup>18</sup> *Thompson v. Lord*, 14 Iowa, 591.

<sup>19</sup> Cal. Code Civ. Pro., § 595; *Kuhland v. Sedgwick*, 17 Cal. 123; *People v. Williams*, 24 id. 31; *People v. Jenkins*, 56 id. 4; *Stone v. Railroad Co.*, 3 S. Dak. 330; *Kelly v. Saunders*, 35 Mo. 200; *Miles v. Danforth*, 32 Ill. 59; *Mugg v. Graves*, 22 Ind. 236.

<sup>20</sup> *People v. Thompson*, 4 Cal. 240.

<sup>21</sup> *People v. Weaver*, 47 Cal. 106; *State v. Gray*, 19 Nev. 212.

tain;<sup>22</sup> 6. That application is not made for delay merely;<sup>23</sup> 7. That a party has a good and substantial cause of action, or defense on the merits.<sup>24</sup> Where an affidavit for a continuance was filed, the court should not permit it to be strengthened by other affidavits of the same person.<sup>25</sup>

**§ 4624. Continuance, when refused.** A continuance will not be granted solely to allow a party to obtain evidence on a point rendered immaterial by his own answer.<sup>26</sup> Continuance will not be granted to the prejudice of the opposite party when the applicant has been guilty of negligence.<sup>27</sup> A party who takes no steps to obtain the deposition of a witness whom he knows to be a seafaring man is not entitled to a continuance for absence of such witness.<sup>28</sup> So where a party neglects to subpoena a witness, relying on his promise to attend.<sup>29</sup> Where the absent witness was a fugitive from justice, and there was no

<sup>22</sup> Cal. Code Civ. Pro., § 595; *Bruton v. State*, 21 Tex. 337; *Winslow v. Bradley*, 15 Wis. 394.

<sup>23</sup> *People v. Thompson*, 4 Cal. 238.

<sup>24</sup> *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

<sup>25</sup> *The State v. Buckner*, 25 Mo. 167. *Affidavit for continuance.*—Necessity of affidavit. See *Stewart v. Sutherland*, 93 Cal. 270; *McGrath v. Tallent*, 7 Utah, 256. The affidavit upon which the application is founded must state all the facts required in the statute to be stated. *Kent v. Favor*, 3 N. Mex. 218, and note, 220. It must state particular facts, as distinguished from legal conclusions. *Deemer v. Falkenburg*, 4 N. Mex. 57. A motion based on the absence of a witness whose knowledge of the facts he was desired to relate was purely hearsay, is properly denied. *Longnecker v. Shields*, 1 Col. App. 264. And the materiality of the testimony of an absent witness must be made to clearly appear. *Dawson v. Coston*, 18 Col. 493. The affidavit is fatally defective, when it fails to show that there are not other persons by whom the defendant could prove the same facts that he expected to prove by the absent witness. *State v. Marshall*, 19 Nev. 240. Instances of insufficient affidavits. See *Hewes v. Andrews*, 12 Col. 161; *Danielson v. Gude*, 11 id. 87; *State v. Gray*, 19 Nev. 212. Where a party opposing a continuance asked for on the ground of the absence of a material witness, admits that the witness, if present, would testify as stated in the moving affidavit, the trial court, under the Oklahoma statute (Okl. Stat., § 4449), commits no error in refusing the continuance. *Chandler v. Colcord*, 1 Okl. 268.

<sup>26</sup> *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120.

<sup>27</sup> *Dulany v. Boston*, 2 Harr. (Del.) 350.

<sup>28</sup> *Deanes v. Scriba*, 2 Cal. 415.

<sup>29</sup> *Freeland v. Howell*, Anth. N. P. 272.

probability of his presence at the next term, and his deposition taken at examination might have been used by the party applying for a continuance, there was no error in refusing the application.<sup>30</sup> Nor will the court abuse its discretion in refusing a continuance where the facts shown on the application cast suspicion on the good faith of the applicant.<sup>31</sup>

§ 4625. **Costs.** In general, taxable costs are the only terms, payment of which should be imposed as a condition of putting off a trial.<sup>32</sup> And only costs incurred with reference to the particular circuit.<sup>33</sup> And when, after postponement on defendant's application, the cause went over again because of the judge's illness, he was not properly chargeable with costs of the circuit.<sup>34</sup> So where the cause goes off at the circuit because plaintiff is not ready.<sup>35</sup>

§ 4626. **Election cases.** The county judge, at chambers, has no power to grant a continuance in an election contest, where trial was set at a future day.<sup>36</sup>

§ 4627. **Grounds for continuance.** The absence of evidence is a ground for continuance. The same in actions of an equitable as in those of a legal character.<sup>37</sup> But a continuance for absence of witnesses will not be granted where only two days have intervened between issuance of subpoena and application for continuance, and the witness resided in a remote part of the county.<sup>38</sup> Nor where the affidavit states that subpoenas for the absent witnesses had been placed in the sheriff's hands four days before the application, but that he had been unable to find the witnesses.<sup>39</sup> Newly-discovered evidence is also a ground for

<sup>30</sup> *People v. Cleveland*, 49 Cal. 577.

<sup>31</sup> *People v. Mortimer*, 46 Cal. 114.

<sup>32</sup> *Hall v. Dwinell*, 10 Wend. 628; *Patton v. Blackwell*, 2 Overt. 114. Terms on granting continuance. See *Tacoma Nat. Bank v. Peet*, 9 Wash. St. 222; *State v. Second Judicial Dist. Ct.*, 10 Mont. 456; *Eltzroth v. Ryan*, 91 Cal. 584.

<sup>33</sup> *Morell v. Gould*, 5 Hill, 553.

<sup>34</sup> *Hanford v. McNair*, 2 Wend. 286; *Bagley v. Ostrom*, 5 Hill, 516.

<sup>35</sup> *Jackson v. Bresse*, 6 Cow. 42.

<sup>36</sup> *Norwood v. Kenfield*, 34 Cal. 329.

<sup>37</sup> *Howard v. Freeman*, 3 Abb. Pr. (N. S.) 292; and see *Robertson v. Woolley*, 6 Wash. St. 156; *Dupont v. McAdow*, 6 Mont. 226, 235.

<sup>38</sup> *Parker v. Campbell*, 21 Tex. 763.

<sup>39</sup> *Jacks v. Buell*, 47 Cal. 162.

continuance.<sup>40</sup> So surprise is a ground for continuance.<sup>41</sup> As by withdrawal of demurrer, and a replication filed in its stead.<sup>42</sup> Or where a pleading is amended in a matter of substance.<sup>43</sup> So on reapportionment of causes.<sup>44</sup> Absence of counsel on account of sickness, and where other competent counsel can not be had, is a good ground for continuance.<sup>45</sup> So where counsel is absent on account of sickness in his family, and the party knows nothing of it until the morning of the trial, the court should at least continue the cause until other counsel can familiarize themselves with the facts.<sup>46</sup> The attendance of a member of the Legislature on its sessions may be a ground for a continuance of a cause in which he is a defendant.<sup>47</sup> But it has been held in California that the voluntary absence of a defendant on important business is no ground for a continuance.<sup>48</sup> A cause may be continued after a hearing for further proof.<sup>49</sup> In Vermont, where all the parties in interest are not before the court, the case may be continued to bring them there.<sup>50</sup> And where, in a suit against partners on a joint claim against them, it appeared that one had been declared bankrupt, but had not yet obtained his discharge, and the case was continued as to him, it was held, on motion for continuance by the other partner, that the cause could not proceed as to him until the disposition of the bankrupt proceedings against his copartner.<sup>51</sup>

§ 4628. **Insufficient grounds.** Voluntary absence of defendant on important business is no ground for continuance.<sup>52</sup> Nor is mistaken advice of counsel to his client not to prepare for

<sup>40</sup> *Berry v. Metzler*, 7 Cal. 418; *Allcorn v. Rafferty*, 4 J. J. Marsh. 220.

<sup>41</sup> *Ross v. Austill*, 2 Cal. 183; *People v. Holden*, 28 id. 124; *Schellhous v. Ball*, 29 id. 608; cited in *Doyle v. Sturla*, 38 id. 456.

<sup>42</sup> *Risher v. Thomas*, 1 Mo. 739.

<sup>43</sup> *Tunstall v. Hamilton*, 8 Mo. 500; *Tourtlot v. Tourtelot*, 4 Mass. 506.

<sup>44</sup> *Elliott v. Cadwallader*, 14 Iowa, 67.

<sup>45</sup> *People v. Logan*, 4 Cal. 188; 60 Am. Dec. 604; *Eltzroth v. Ryan*, 91 Cal. 584.

<sup>46</sup> *Thompson v. Thornton*, 41 Cal. 626.

<sup>47</sup> *Johnson v. Offutt*, 4 Metc. (Ky.) 19.

<sup>48</sup> *Wilkinson v. Parrott*, 32 Cal. 102.

<sup>49</sup> *Washburn v. Holmes*, Wright, 67.

<sup>50</sup> *Beardsley v. Knight*, 10 Vt. 185; 33 Am. Dec. 193.

<sup>51</sup> *Tinkum v. O'Neale*, 5 Nev. 93.

<sup>52</sup> *Wilkinson v. Parrott*, 32 Cal. 102. Continuance granted on account of illness of plaintiff. *Jaffe v. Lillenthal*, 101 Cal. 175.

trial.<sup>53</sup> Voluntary absence of attorney is no cause for continuance.<sup>54</sup> When, through the inadvertence of a party, he is unable to produce evidence which is in his own possession, no continuance will be granted.<sup>55</sup> The absence of a transient witness, whom the party had no opportunity of examining before the trial, is no excuse for putting off the trial. It is no ground for a continuance that a material witness for the applicant is in another county in this State, where the applicant has taken no steps to procure his deposition, because he saw the witness several weeks before, and the witness promised to be present at the trial.<sup>56</sup> Nor that the applicant was informed by his attorneys, several weeks before the term, that the case could not be tried at that term, and that such attorneys reside at a great distance, and are not present, and their attendance can not be procured.<sup>57</sup>

§ 4629. **Insufficient statement.** In application for continuance, the allegation that a party has used all the diligence in his power is not sufficient: it should be shown to the court of what such diligence consisted; whether by exhausting the process of the court, or otherwise.<sup>58</sup> For the same reason, if a party states, on information and belief, that he can procure the personal attendance of a witness from a distant foreign country, he should set forth the reasons for the belief, and the nature of his information, that the court may decide whether or not there is reasonable ground to believe that the witness will attend.<sup>59</sup> Inconvenience to prepare for hearing is not a good ground for postponement of the argument.<sup>60</sup> Where, however, the affidavit

<sup>53</sup> *Musgrove v. Perkins*, 9 Cal. 211.

<sup>54</sup> *Haight v. Green*, 19 Cal. 113; *Adams v. Adams*, 1 Duval, 167; see *Lumber Co. v. Cole*, 2 Wash. St. 57; *Catlin v. Harris*, 7 id. 542; *Zelinsky v. Price*, 8 id. 256. A party to an action has no absolute right to a continuance because of the absence of his attorney, who is engaged in the trial of a case in another court, but it is within the sound discretion of the trial court to grant or refuse the continuance. *Baumberger v. Arff*, 96 Cal. 261; *People v. Collins*, 75 id. 411.

<sup>55</sup> *Kuhland v. Sedgwick*, 17 Cal. 123.

<sup>56</sup> *Lightner v. Menzel*, 35 Cal. 452.

<sup>57</sup> *Id.*

<sup>58</sup> *People v. Thompson*, 4 Cal. 241.

<sup>59</sup> *People v. Francis*, 38 Cal. 183.

<sup>60</sup> *Bank of Salina v. Alvord*, 32 N. Y. 684. Parties will not be forced to trial without a reasonable opportunity to prepare therefor, and the court would abuse its discretion in refusing a continuance, or in refusing to set aside a judgment taken because of hasty action

for continuance failed to show the materiality of the testimony of the absent witness, but it appeared that the court in deciding the motion assumed that it did, and no objections were made on that ground by the opposite party, it was held that the objection could not be made for the first time on appeal.<sup>61</sup>

**§ 4630. Stipulation.** A continuance may be granted on consent of parties, reduced to written stipulations therefor; but an agreement of counsel for the continuance of a cause, not reduced to writing, will not be regarded by the court.<sup>62</sup> In Justices' Courts the court may, by consent of the parties, given in writing or in open court, postpone the trial to a time agreed upon by the parties.<sup>63</sup> A defendant dangerously ill may be required, as a condition of postponing the trial, to stipulate that his death before the next circuit shall not abate the cause.<sup>64</sup>

**§ 4631. Preventing a continuance.** If the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed.<sup>65</sup> The affidavit thereupon becomes evidence, but not conclusive proof of its contents.<sup>66</sup> The admissions of a party wishing to avoid a continuance must be broad enough to cover all the material facts to which the absent witness would testify, as alleged in the affidavit for a continuance.<sup>67</sup> The admission of counter-affidavits, on a motion for a continuance, is in the sound discretion of the court.<sup>68</sup> Where a continuance was granted for seven days, in an election contest, against the objections of respondent, and without affidavits, it was held that it operated a discontinuance of the proceeding.<sup>69</sup>

In setting a case for trial at an unreasonably early day, whereby a party has been unable to be present or to prepare for trial. *Dusy v. Prudom*, 95 Cal. 646.

<sup>61</sup> *State v. Chapman*, 6 Nev. 320.

<sup>62</sup> *Peralta v. Mariea*, 3 Cal. 187.

<sup>63</sup> Cal. Code Civ. Pro., § 875.

<sup>64</sup> *Ames v. Webbers*, 10 Wend. 575.

<sup>65</sup> Cal. Code Civ. Pro., § 595; *Boggs v. Merced Min. Co.*, 14 Id. 358; *O'Neil v. New York & Silver Peak Min. Co.*, 3 Nev. 141.

<sup>66</sup> Id.

<sup>67</sup> *Peck v. Lovett*, 41 Cal. 521.

<sup>68</sup> *Riggs v. Fenton*, 3 Mo. 28; *Anon.*, 3 Day, 308; and see *Kneebone v. Kneebone*, 83 Cal. 645.

<sup>69</sup> *Keller v. Chapman*, 34 Cal. 635.



**§ 4632. Waiver of rights.** Where the plaintiff to an action, with full knowledge of his right to proceed to trial only at his own option, against the defendants served, and of the fact that no service had been made upon one of the defendants, who had left the state, and that no issue had been joined as to him, first agreed with the defendants served, without reservation, that the issue between him and them should be set for trial at a particular day, then asked and obtained a continuance, for the reason solely that his witnesses were not present, and in consideration of such continuance, by consent, agreed of record that the case should be set for trial and be tried on a particular day; it was held that this state of facts clearly constituted a waiver by plaintiff of his right to delay the trial until said other defendant had been served or issue joined in respect to him.<sup>70</sup>

**§ 4632a. Conduct of trial — miscellaneous — presence of party.** The right to prosecute a suit in court carries with it, as a necessary incident, the further right to be present during the trial. And a statute providing that during a trial the judge may exclude from the courtroom any witness of the adverse party not at the time under examination, does not authorize the exclusion of a party in such case.<sup>71</sup>

**§ 4632b. Watching progress of trial.** A party to a cause must either personally or by his attorneys, whether they reside in the county where the case is to be tried or elsewhere, watch its progress, and can not object that a proceeding is taken against him in his absence, unless it is taken through his mistake, inadvertence, surprise or excusable neglect.<sup>72</sup> Parties are charged with notice of the fact that the case has been set for trial. They are bound to know the rules of the trial court, and if the rules fix a day for setting causes for trial, they are presumed to know the fact, and if the rules do not, they must govern themselves ac-

<sup>70</sup> *Meagher v. Garliardo*, 35 Cal. 602. Pending the trial of an action against two defendants, the court granted a continuance as to one of them, and the plaintiff, without objection, proceeded with the trial against the other, in whose favor a judgment was subsequently rendered, and it was held that the plaintiff had waived the right to object to the irregularity at the trial by reason of the continuance. *Myers v. McDonald*, 68 Cal. 162.

<sup>71</sup> *Schnelder v. Haas*, 14 Oreg. 174.

<sup>72</sup> *Eltzroth v. Ryan*, 91 Cal. 584; Cal. Code Civ. Pro., § 473.



cordingly, and learn from the proceedings of the court when the case is to be heard.<sup>73</sup>

§ 4632c. **Absence of defendant.** Under Colorado practice, a cause having been set and reached, the plaintiff may insist upon a trial in the absence of the defendant, unless the court for good cause legally established otherwise direct.<sup>74</sup>

§ 4632d. **Transfer of cases for trial.** In California, the judges of the Superior Court in a particular county, for the convenient dispatch of business, or for any other reason they may deem necessary, may assign and transfer cases for trial to any one or more of the several departments of such court, without notice to the parties.<sup>75</sup>

§ 4632e. **Object and sufficiency of notice of trial.** The only object of a notice of trial is to give the party on whom it is served a chance to prepare for trial. And a notice of trial, erroneous as to the day of trial, is nevertheless sufficient, if such notice, when read in the light of other information which the law gives, truly informs the party as to the time and place of trial.<sup>76</sup>

§ 4632f. **Power of judge after expiration of term.** Upon the expiration of the term of office of a judge his judicial power ceases, and it is not competent for him thereafter to do any act necessary to complete the trial of any cause which remains unfinished at the expiration of his term.<sup>77</sup>

§ 4632g. **Discretion of trial court.** In matters of practice before it, the trial court is vested with large discretionary powers, with which the appellate court will not ordinarily interfere. It is, however, a judicial discretion, to be exercised in furtherance of justice, and not capriciously or oppressively.<sup>78</sup>

§ 4632h. **Reinstating case — waiver of irregularity.** The irregularity, if any, in reinstating a case which had been dismissed because of a failure to file the complaint within the

<sup>73</sup> *Dusy v. Prudom*, 95 Cal. 646.

<sup>74</sup> *Hamill v. Hall*, 4 Col. App. 290.

<sup>75</sup> *Bell v. Peck*, 104 Cal. 35; compare *Cottrell v. Cottrell*, 83 id. 457; *Seattle, etc., Railway Co. v. State*, 7 Wash. St. 150.

<sup>76</sup> *Smith v. Railroad Co.*, 3 N. Dak. 17.

<sup>77</sup> *Broder v. Conklin*, 98 Cal. 360; *Connolly v. Ashworth*, id. 205; *Mace v. O'Reilley*, 70 id. 231.

<sup>78</sup> *Mitchell v. Campbell*, 14 Oreg. 454.

time allowed by law, is waived by appearing generally, filing an answer and going to trial.<sup>79</sup>

**§ 4632i. Trial by stipulation.** Where parties appear and by stipulation submit their controversy to a court having jurisdiction of the subject-matter thereof, they can not afterwards be heard to question the authority of such tribunal.<sup>80</sup>

**§ 4632j. Stipulation of attorneys, generally.** As a general rule, a stipulation of counsel can not be enforced unless put in writing, or entered in the minutes of the court.<sup>81</sup> The court will not attempt to determine the nature or effect of disputed oral stipulations of litigants or attorneys affecting the rights of parties or the conduct of the trial, and it will not enforce such stipulations unless the attorneys agree in open court as to what they are.<sup>82</sup> But if attorneys in an action have acted upon a written agreement, to such an extent that it would be inequitable not to recognize its binding effect, the court will not allow the agreement to be repudiated, upon the ground that it has not been filed with the clerk.<sup>83</sup> And where an oral agreement for an extension of time to answer or demur is admitted, and has been relied upon by the defendant, a judgment by default taken against him in violation of the terms of the stipulation should be set aside.<sup>84</sup> The court may, in a proper case, relieve against a stipulation entered into by attorneys.<sup>85</sup> And may set aside such stipulation for mistake.<sup>86</sup>

<sup>79</sup> *Cole v. Thornburg*, 4 Col. App. 95.

<sup>80</sup> *Edwards v. Smith*, 16 Col. 529.

<sup>81</sup> See Cal. Code Civ. Pro., § 283; *Spencer v. McMaster*, 3 Wyo. 105.

<sup>82</sup> *Sebree v. Smith*, 2 Idaho, 329.

<sup>83</sup> *Smith v. Whittier*, 95 Cal. 278; and see *Griess v. Insurance Co.*, 93 id. 411.

<sup>84</sup> *Johnson v. Sweeney*, 95 Cal. 304.

<sup>85</sup> *Welsh v. Noyes*, 10 Col. 133.

<sup>86</sup> *Ward v. Clay*, 82 Cal. 502. Stipulation construed. See *Sweeney v. Railway Co.*, 11 Mont. 523.

## CHAPTER III.

### TRIAL BY THE COURT.

§ 4633. **In general.** Either party may bring an issue to trial, or to a hearing, and in the absence of the adverse party, unless the court for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict, or judgment, as the case may require.<sup>1</sup> In actions for the recovery of specific real or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases issues of fact must be tried by the court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code.<sup>2</sup> Waiver of jury trial must appear affirmatively and not by implication.<sup>3</sup> And notwithstanding the waiver, the court may direct an issue of fact to be tried by a jury.<sup>4</sup>

Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, or for the recovery of specific real or personal property, with or without damages, and with the assent of the court in other actions.<sup>5</sup> 1. By failing to appear at the trial. So in replevin, when the action is called;<sup>6</sup> and filing an answer does not operate as an appearance at the trial.<sup>7</sup> 2. By written consent, in person or by attorney, filed

<sup>1</sup> Cal. Code Civ. Pro., § 594.

<sup>2</sup> Id., § 592; see § 4617, *ante*.

<sup>3</sup> Smith v. Polack, 2 Cal. 92; see, also, Russell v. Elliott, id. 245; and Exline v. Smith, 5 id. 112; but see Cal. Code Civ. Pro., § 631; and Doll v. Anderson, 27 Cal. 248.

<sup>4</sup> Id.

<sup>5</sup> Cal. Code Civ. Pro., § 631; and see Farwell v. Murray, 104 Cal. 467.

<sup>6</sup> Waltham v. Carson, 10 Cal. 178; in ejectment, in Doll v. Feller, 16 id. 433; and generally, Gillespie v. Benson, 18 id. 409.

<sup>7</sup> Zane v. Crowe, 4 Cal. 112.

with the clerk. 3. By oral consent in open court, entered on the minutes.<sup>8</sup> Equitable cases are properly triable by the court, and the trial of issues of fact by a jury can not be claimed as of right, but rests in the discretion of the court;<sup>9</sup> and in chancery cases parties are not entitled to a trial by jury.<sup>10</sup> And in such cases the court may disregard the verdict of a jury.<sup>11</sup> In a suit

<sup>8</sup> Cal. Code Civ. Pro., § 631; 2 Whitt. Pr. 220; 2 Till. & Shear. Pr. 428. *Equity cases — trial by court.*— In the trial of equity cases the court may, on its own motion, invoke the aid of a jury to determine specific questions of fact, but such findings are simply advisory. *Hall v. Linn*, 8 Col. 264. It is within the discretion of the court to submit both legal and equitable issues to the jury at the same time. *Houser v. Austin*, 2 Idaho, 187. But the right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. *Pacific Railway Co. v. Wade*, 91 Cal. 449. In such cases the court may pass upon all legal issues incidental to the equitable relief sought. *Downing v. Le Du*, 82 Cal. 471. The court may call a jury to try such specific questions of fact as may be submitted to them, reserving to itself the power to make its own findings upon consideration of the evidence and the verdict. *Saint v. Guerrero*, 17 Col. 448. An action to foreclose the lien of a street assessment is in equity, and a party is not entitled to a jury trial. *Santa Cruz, etc., Pavement Co. v. Bowie*, 104 Cal. 286. So of an action to foreclose a mechanic's lien. *Loan Co. v. Wentworth*, 1 Wash. St. 467. So of an action for an accounting between partners. *Hamar v. Peterson*, 9 Id. 152. Nor is a plaintiff entitled to a jury trial in an equitable action for an injunction to restrain the diversion of water and to abate a dam and ditch as a nuisance, although there is joined therewith a claim for damages suffered in consequence of past diversion of water. *Churchill v. Baumann*, 104 Cal. 369. The Oregon statute (Sess. Laws, 1885, p. 69), relating to practice in equity suits, was intended to apply only to ordinary suits, and not to cases where the trial court is merely called upon to inquire into and adjust a collateral matter not affecting the merits. *Martin v. Martin*, 14 Oreg. 165. The court does not acquire the right to pass upon a legal defense without a jury trial by virtue of being first called upon to dispose of an equitable defense. And if the trial of the equitable defense does not obviate the necessity of a trial of the issues of law, they must be tried in the same manner as if no equitable defense had been interposed. *Swasey v. Adair*, 88 Cal. 179.

<sup>9</sup> *Moffat v. Moffat*, 10 Bosw. 468; 17 Abb. Pr. 4; *McCarty v. Edwards*, 24 How. Pr. 236; *Dearborn Foundry Co. v. Augustine*, 5 Wash. St. 67; *Wintermute v. Carner*, 8 Id. 585.

<sup>10</sup> *Walker v. Sedgwick*, 5 Cal. 192; *Cahoon v. Levy*, Id. 294; *Kopplius v. State Capitol Commissioners*, 16 Id. 248.

<sup>11</sup> *Goode v. Smith*, 13 Cal. 84; *Knapp v. Day*, 4 Col. App. 21; *Kirtley v. Mining Co.*, 8 Col. 279.

between partners for a dissolution, accounting, etc., where there are questions of fact which might properly be tried by a jury, yet if the cause is actually tried by the court, and all the testimony in, and the cause finally submitted to the court for its determination, it is then too late to order a trial by jury. It is the duty of the judge to decide the questions submitted, and it is the right of the parties respectively to have such decision.<sup>12</sup> But it is no error for a judge to hear arguments at chambers after a cause has been submitted to him, and thereupon decide the case.<sup>13</sup> In Missouri, proceedings against a constable for delinquency must be heard by the court.<sup>14</sup> In a case for specific performance and damages, where specific performance can not be adjudged, the case may be retained and sent to a jury to award damages.<sup>15</sup> And so in a case to reform a policy and recover for a loss.<sup>16</sup> Both legal and equitable relief may be sought in the same action, but when plaintiffs move a trial at a Special Term, and defendants demand a jury trial, the court should direct the cause to be tried by the jury.<sup>17</sup> So relief was refused and complaint dismissed where plaintiff elected to sue as in equity, and then, on failure at trial, wished the case retained and tried as at law.<sup>18</sup> On mixed issues involving a demand for equitable relief or damages, the case retained and sent to a jury after failure to establish former demand, on trial by the court.<sup>19</sup>

<sup>12</sup> O'Brien v. Bowes, 4 Bosw. 657.

<sup>13</sup> City of San Jose v. Shaw, 45 Cal. 178.

<sup>14</sup> Hart v. Robinett, 5 Mo. 11; Hart v. Spence, id. 17.

<sup>15</sup> Barlow v. Scott, 24 N. Y. 40; Stevenson v. Buxton, 37 Barb. 13; 15 Abb. Pr. 352; see, also, See v. Partridge, 2 Duer, 463.

<sup>16</sup> New York Ice Co. v. N. West. Ins. Co., 23 N. Y. 357; S. C., 12 Abb. Pr. 414; S. C., 21 How. Pr. 296; reversing 10 Abb. Pr. 34; Van Valen v. Lapham, 13 How. Pr. 240; and overruling Van Beck v. Village of Rondout, 15 Abb. Pr. 48.

<sup>17</sup> Davis v. Morris, 36 N. Y. 569.

<sup>18</sup> Craig v. Hyde, 24 How. Pr. 313.

<sup>19</sup> Genet v. Howland, 45 Barb. 560; S. C., 30 How. Pr. 360. A jury can only be waived in one of the modes prescribed by the statute. Swasey v. Adair, 88 Cal. 179. Though a jury trial may have been demanded by the defendant before the trial, it is waived by his failure to appear at the trial, and the court may dispense with a jury in such case. McGuire v. Drew, 83 Cal. 225. Continuance of trial at defendant's request — no waiver. See Farwell v. Murray, 104 Cal. 464. Application for *mandamus*, waiver of right of jury. Territory v. County of Bernalillo, 4 N. Mex. 204. The right is not waived by neglecting to demand a jury at the time the case is called to be set for trial, notwithstanding a rule of court that a

§ 4634. **Findings by the court.** Upon the trial of a question of fact by the court, its decision must be given in writing, and filed with the clerk, within thirty days after the cause is submitted for decision.<sup>20</sup> The above section is directory as to the time required for the written decision to be filed.<sup>21</sup> This section is applicable to cases both at law and in equity,<sup>22</sup> but does not apply in cases of nonsuit.<sup>23</sup> If the judge should discover a clerical mistake in his findings, or that he had inadvertently committed an error, and should correct it at the same term, before the entry of judgment, while the proceeding is still *in fieri*, and in such a manner as not to deprive the party of opportunity to move for a new trial, or abridge the time for motion for new trial, or cause him to lose any other right thereby, a new trial should not be granted on that ground.<sup>24</sup> The judge who tried the case without a jury did not file his findings of the facts until after the judgment was entered; it was held not to be error.<sup>25</sup> But a judge can not change his findings of facts in a material particular after the entry of judgment on the findings and the adjournment of the term.<sup>26</sup>

jury shall then be demanded. *Biggs v. Lloyd*, 70 Cal. 447. But where a case has been set down by consent of counsel for trial, and afterwards comes on regularly for trial before the court without a jury, and the trial actually begins, it is a waiver of a jury trial. *Polack v. Gurnee*, 66 Cal. 266. The recital of the waiver of a jury trial in the findings can not prevail against a showing in the bill of exceptions that a jury trial was demanded and denied. *Downing v. Le Du*, 82 Cal. 471. If a jury has been waived, and a trial had before a referee, the waiver holds good for a retrial of the cause after a reversal on appeal. *Park v. Mighell*, 7 Wash. St. 304. Waiver of jury—presumption upon appeal. See *Montgomery v. Sayre*, 91 Cal. 206.

<sup>20</sup> Cal. Code Civ. Pro., § 632; *McKeon v. McDermott*, 22 Cal. 667; 83 Am. Dec. 86. The trial of a cause by the court is not concluded until the decision is filed with the clerk. *Connolly v. Ashworth*, 98 Cal. 205; and see *San Joaquin Land & Water Co. v. West*, 99 id. 345.

<sup>21</sup> *McQuillan v. Donahue*, 49 Cal. 157; *People v. Dodge*, 5 How. Pr. 47; *Lewis v. Jones*, 13 Abb. Pr. 427.

<sup>22</sup> *Lyons v. Lyons*, 18 Cal. 447; see, also, *Duff v. Fisher*, 15 id. 375; *Stewart v. Slater*, 6 Duer, 83, 102; *Burger v. Baker*, 4 Abb. Pr. 11.

<sup>23</sup> *Gilson R. M. Co. v. Gilson*, 47 Cal. 597.

<sup>24</sup> *Prince v. Lynch*, 38 Cal. 531; 99 Am. Dec. 427; and see *Crim v. Kessing*, 89 Cal. 478; *Smith v. Taylor*, 82 id. 533.

<sup>25</sup> *Vermule v. Shaw*, 4 Cal. 214; cited in *Keller v. Sutrick*, 22 id. 473.

<sup>26</sup> *Carpentier v. Gardiner*, 29 Cal. 160; *Los Angeles v. Lankershim*, 100 id. 525.

## § 4635. Findings in action for divorce.

Form No. 1131.

[TITLE.]

This cause having been heretofore, on the ..... day of ....., 18.., submitted to the court for decision upon the complaint of the plaintiff, and the answer and cross-complaint of the defendant herein filed, and the report of G. H., Esq., court commissioner of this court, to whom the said cause was referred to take and report in writing the testimony of the parties, by order entered the ..... day of ....., 18.., after hearing the arguments of counsel for the respective parties, and the court being fully advised, now finds the following facts:

I. The plaintiff and defendant were married, one with the other, at Washoe county, state of Nevada, on the ..... day of ....., 18.., and cohabited together as husband and wife from thence until the ..... day of ....., 18..

II. That both the plaintiff and defendant are *bona fide* residents of the state of ....., and have so resided in this state for more than six months continuously next before the commencement of this action and the filing of the complaint herein; and that at the time of the commencement of this action the said plaintiff was a *bona fide* resident of the city and county of .....

III. That the plaintiff and defendant have two children, issue of said marriage, viz.: T. U., aged ..... years, and V. W., aged ..... years.

IV. That between the ..... day of ....., 18.., and the ..... day of ....., 18.., at a lodging-house, ..... street, in the city of ....., the plaintiff, A. B., committed adultery with one ....., and lived during said time in adulterous intercourse with him. That on the ..... day of ....., 18.., or thereabouts, the plaintiff, A. B., lived in a house of prostitution, No. ....., ..... street, in said city and county of ....., said house being kept by one ..... and then and there repeatedly committed adultery with divers persons, and earned a livelihood by habits of prostitution.

V. That the plaintiff and defendant have not cohabited with each other since the ..... day of ....., 18.. That each and every of said acts of adultery was committed

without the consent, connivance, privity, or procurement of the defendant, and that the defendant has not cohabited with the plaintiff since his discovery of said adultery.

VI. That the plaintiff is, and has been for a long time past, an abandoned woman, addicted to the use of intoxicating drinks, and that she is a person by character, disposition, conduct temper, and passions wholly unfit to have the care, custody, or management of children.

VII. That the property mentioned and described in the complaint is community property, and is of the value of ..... dollars.

As conclusions of law from the foregoing facts, the court finds:

I. That the defendant is entitled to a decree of this court dissolving the bonds of matrimony heretofore existing between plaintiff and defendant, decreeing the plaintiff and defendant each to be freed and absolutely released from the bonds of matrimony, and all the obligations thereof.

II. That the defendant, C. D., is entitled to be awarded the sole charge, control, and custody of the children, issue of said marriage.

L. M.,

[DATE.]

Judge.

In an action for divorce, it is optional with the judge to submit special issues to the jury or not.<sup>27</sup>

#### § 4636. Findings in action to quiet title.

*Form No. 1132.*

[TITLE.]

This cause having been called regularly for trial before the court (a jury trial having been expressly waived by stipulation in writing of the respective parties appearing therein) [or as the case may be], E. F. appeared as attorney for the plaintiff, and G. H. appeared as attorney for defendant. And the court having heard the proofs of the respective parties, and considered the same, and the records and papers in the cause, and the arguments of the respective attorneys thereon, and the cause having been submitted to the court for its decision, the court now finds the following facts:

I. That the plaintiff entered into actual possession of all the

<sup>27</sup> *Cleghorn v. Cleghorn*, 66 Cal. 309. Chancery practice in divorce cases. See *Gilpin v. Gilpin*, 12 Col. 504; *Redington v. Redington*, 2 Col. App. 8.



lots, land, and premises described in the complaint, on or about the ..... day of ....., in the year of our Lord one thousand eight hundred and ....., claiming it in his own right; and the said plaintiff has, ever since the date last aforesaid, occupied, used, and cultivated said land, having and keeping the same surrounded by a substantial inclosure, using and claiming the same, in his own right, from that date to the present time, adversely to all the world, and especially as against the defendants.

II. That neither one of all the defendants mentioned in the complaint, nor any grantor or predecessor of any of said defendants, has been in the possession of any part of said premises since the ..... day of ....., 18..; and that the plaintiff first entered upon said premises justly and lawfully, and not as a trespasser as against the rights of any or either of said defendants, or of those under or through whom they claim.

III. That the whole of the land described in the complaint lies within the city and county of San Francisco, and within the limits of what is usually and properly known as and called the Van Ness ordinance.

IV. That all the allegations and averments of the plaintiff's complaint are true, and all the denials and allegations of the defendant's answer are untrue.

As conclusions of law from the foregoing facts, the court now hereby finds and decides:

I. That the plaintiff is the owner in fee simple and entitled to the possession of all the lots, tracts, and parcels of land, as the same are described in his complaint on file herein, as against the defendants all and severally, and all persons claiming or to claim the same, or any part of said land, under them, the said defendants, or either of them, and that neither one of said defendants has any right, title, or interest in or to said land, or any part thereof.

II. That the plaintiff is entitled to a decree, as prayed for in his complaint, to quiet his title to said land, against said defendants, and each of them, and all persons claiming or to claim the same, or any part thereof, under or through the said defendants, or either of them.

III. That the plaintiff is entitled to a judgment for costs, to be taxed herein against only the defendants who have answered herein contesting plaintiff's rights in said premises; and as

to the other defendants who have not answered, or who have answered disclaiming, costs are not to be taxed.

And judgment is hereby ordered to be entered accordingly.

[DATE.]

<sup>28</sup>[SIGNATURE.]

§ 4637. **Findings on contract.** In an action on contract, the question of waiver being within the issue, and the facts being all before the referee, it was held that his finding on the question should be sustained, although the question was not distinctly raised by the pleadings.<sup>29</sup> In an action to recover judgment against a municipal corporation for work done on contracts, and warrants issued therefor, if the court finds that the warrants issued were issued after the accounts under the contract were audited, and were issued in consideration thereof, it is a sufficient finding that the warrants were drawn for the amount due on the contracts.<sup>30</sup> Where the defendant's liability depends entirely upon the fact of his indebtedness to a third party, the fact of his indebtedness is the only fact to be found.<sup>31</sup>

§ 4638. **The same — conversion.** The legal effect of findings for the defendant, on the question of the plaintiff's right to the property, was to entitle the defendants from whom the property was taken to its restoration.<sup>32</sup> A finding that hay, alleged to have been converted, was worth twenty dollars a ton, without finding the number of tons converted, does not entitle plaintiff to a judgment.<sup>33</sup>

§ 4639. **The same — ejectment.** If the court, in ejectment, finds that the defendant has no right or title to the premises, or to the possession thereof, and plaintiff is a tenant in common in the premises with the estate of a deceased cotenant, and the parties stipulated during the trial, as a substitute for evidence on this point, that the defendant entered under a deed from the administrator of the deceased cotenant, and by his permission, the finding is contrary to the evidence.<sup>34</sup> When title is found in

<sup>28</sup> Where the answer sets up new matter, a finding that the allegations of the complaint are true is insufficient. The court should find also as to the new matter. *People v. Forbes*, 51 Cal. 628. And an omission to find upon a counterclaim is error. *Baggs v. Smith*, 53 id. 88.

<sup>29</sup> *Van Buskirk v. Stow*, 42 Barb. 9.

<sup>30</sup> *Argenti v. San Francisco*, 30 Cal. 458.

<sup>31</sup> *Smith v. Coe*, 29 N. Y. 666.

<sup>32</sup> *Waldman v. Broder*, 10 Cal. 378.

<sup>33</sup> *Trov v. Clarke*, 30 Cal. 419.

<sup>34</sup> *Carpentier v. Small*, 35 Cal. 846.

one party, the court is not required to find the facts constituting the other party's claim of title, but if requested, the better practice would be to make such finding.<sup>35</sup> Where the court finds simply that the defendant was in possession at the date of the action, and that he wrongfully withheld the possession of the same from the plaintiff, it must be presumed at least in favor of the judgment that this holding was in subordination to the legal title.<sup>36</sup> The findings should state explicitly whether defendant was affected with notice of the fraud of those through whom he claimed title, where notice of such fraud is material.<sup>37</sup> Where a party is in possession of an inclosed portion of a tract, claiming the whole under a deed, it is error in the court to find a constructive possession to the land outside of the inclosure where the grantor in the deed had not actual possession of the whole.<sup>38</sup>

§ 4640. **Facts, how found.** Where an answer does not deny the allegations of the complaint, but sets up new matter as a defense, a finding that the facts stated in the complaint are true is not a finding upon all the issues. The court should find upon the new matter.<sup>39</sup> An omission to find upon a counter-claim is error.<sup>40</sup> A finding which states only general conclusions, leaving it doubtful what particular facts were established, is defective, and a refusal to amend it on application is error.<sup>41</sup> The finding of facts must be within the issues raised by the pleadings;<sup>42</sup> and must cover all the issues,<sup>43</sup> whether evidence

<sup>35</sup> *Burke v. Table Mt. Water Co.*, 12 Cal. 403; *Meador v. Parsons*, 19 id. 294; *Merrill v. Chapman*, 34 id. 251. A finding in an action of ejectment, that the plaintiff is the owner of the land in controversy, is a sufficient finding that the defendants are not the owners. *Coates v. Cleaves*, 92 Cal. 427. In ejectment, failure to find as ground for reversal. See *Christy v. Water-works*, 84 id. 541; *Himmelman v. Henry*, id. 104.

<sup>36</sup> *Sharp v. Daughney*, 33 Cal. 505; *Chouquette v. Barada*, 23 Mo. 331.

<sup>37</sup> *Chouteau v. Nuckolls*, 20 Mo. 442.

<sup>38</sup> *Walsh v. Hill*, 38 Cal. 481.

<sup>39</sup> *People v. Forbes*, 51 Cal. 628; *Phipps v. Harlan*, 1 Pac. C. L. J. 191.

<sup>40</sup> *Baggs v. Smith*, 53 Cal. 88.

<sup>41</sup> *Polhemus v. Carpenter*, 42 Cal. 375; *Ladd v. Tully*, 51 id. 277.

<sup>42</sup> *Morenhout v. Barron*, 42 Cal. 591; *Devoe v. Devoe*, 51 id. 543; *Allison v. Darton*, 24 Mo. 343; *Farrar v. Lyon*, 19 id. 122.

<sup>43</sup> *Rosquett v. Crane*, 51 Cal. 505; *Rice v. Inskeep*, 34 id. 225; *Downing v. Bourlier*, 21 Mo. 149.

upon an issue is introduced or not.<sup>44</sup> Findings may refer to the pleadings, but the reference should be direct, and so as to leave no doubt.<sup>45</sup> Where facts are so obscurely found, or are so blended with legal conclusions as to render it doubtful whether the facts are only hypothetically stated, it will be disregarded as a finding of fact.<sup>46</sup> Only the ultimate facts should be found, and not the evidence.<sup>47</sup>

§ 4641. **Facts left to inference.** To justify the Supreme Court in inferring a material fact not expressed in the findings, from others which are expressly found, it must appear that the fact to be inferred follows inevitably from the facts found; that upon every conceivable theory of the case, the nonexistence of the fact to be inferred is inconsistent with the facts found.<sup>48</sup> The objection of the section of the Code relating to findings<sup>49</sup> is to do away with the doctrine of implied findings as based on the former statute, and to separate, for the facility of investigation, questions of fact and law.<sup>50</sup> If the facts are found, it must affirmatively appear that they support the judgment.<sup>51</sup>

§ 4642. **Findings conclusive.** The finding of a court will not be disturbed, unless the evidence was such that, if the question at issue had been submitted to a jury, and they had rendered a verdict in accordance with the finding, the court would have set it aside as contrary to evidence.<sup>52</sup> The application of the rule that findings will not be disturbed on appeal, when there is a manifest conflict in the evidence, depends in no measure upon the question whether any of the witnesses are interested in the event of the suit. The credit to be given to their testimony, however attacked, must be determined in the court below.<sup>53</sup> If

<sup>44</sup> *Speegle v. Leese*, 51 Cal. 415.

<sup>45</sup> *McEwan v. Johnson*, 7 Cal. 258; *Breeze v. Doyle*, 19 id. 101; see, also, *Kelley v. McKibben*, 53 Cal. 13.

<sup>46</sup> *Figg v. Mayo*, 39 Cal. 262.

<sup>47</sup> *Pico v. Cuyas*, 47 Cal. 174; but see *Coveny v. Hale*, 49 id. 552.

<sup>48</sup> *Emmal v. Webb*, 36 Cal. 197.

<sup>49</sup> Cal. Code Civ. Pro., §§ 632, 633.

<sup>50</sup> *Dowd v. Clarke*, 51 Cal. 262. For decisions under the former statute, see *Shelby v. Houston*, 38 Cal. 410, and cases cited, 321.

<sup>51</sup> *N. P. R. R. Co. v. Reynolds*, 50 Cal. 90. It will be presumed upon appeal that the inference made by the trial court was one that will uphold rather than defeat the judgment. *Breeze v. Brooks*, 97 Cal. 72; *Gould v. Eaton*, 111 id. 639.

<sup>52</sup> *Moore v. Murdock*, 26 Cal. 514.

<sup>53</sup> *Putnam v. Lamphier*, 36 Cal. 151; consult "Appeal."

no motion is made for a new trial, the finding of the court and verdict of the jury are conclusive as to the facts.<sup>54</sup> Or where they are not excepted to.<sup>55</sup>

§ 4643. **Findings contrary to admissions in the pleadings.** A finding contrary to facts admitted in the pleadings must be disregarded;<sup>56</sup> and the judgment must follow such admissions.<sup>57</sup>

§ 4644. **Finding contrary to stipulation.** If the finding of a fact on a material point is contrary to a stipulation of the parties made in the course of the trial as a substitute for evidence, a new trial will be granted, on the ground that the finding is contrary to the fact as stipulated, and, therefore, unsupported by the evidence.<sup>58</sup>

§ 4645. **Findings are not necessary.** When the facts are admitted or not denied in the pleadings;<sup>59</sup> or when judgment is rendered on the pleadings;<sup>60</sup> or in case of nonsuit.<sup>61</sup> If illegal

<sup>54</sup> *Brown v. Tolles*, 7 Cal. 399; *Garwood v. Simpson*, 8 id. 108; *Duff v. Fisher*, 15 id. 379; *Gagliardo v. Hoberlin*, 18 id. 395; *Pico v. Ouyas*, 47 id. 174. Where the evidence is substantially conflicting upon any particular issue, a finding thereon will not be disturbed on the ground of the insufficiency of the evidence to justify it. *Hoyt v. Smelting Co.*, 90 Cal. 339; and, to same effect, *Borderre v. Den*, 106 Cal. 594; *Raynor v. Drew*, 72 id. 307; *Alhambra, etc., Water Co. v. Richardson*, 72 id. 598; *Myers v. Tibbals*, id. 278; *Ingalls v. Austin*, 8 Mont. 333; *Welland v. Williams*, 21 Nev. 230; *Monat v. Hilderbrand*, 15 Col. 382; *Heilbron v. Canal Co.*, 76 Cal. 11. But where there is no substantial conflict in the evidence and the findings are against the weight of the evidence, the judgment founded on such findings will be reversed. *Buttz v. Colton*, 6 Dak. 306.

<sup>55</sup> *Gray v. Moss*, 34 Cal. 125; but see Cal. Code Civ. Pro., § 647.

<sup>56</sup> *Bradbury v. Cronise*, 46 Cal. 287.

<sup>57</sup> *McDonald v. M. V. Homestead Assoc.*, 51 Cal. 210; also, *Traverso v. Tate*, 82 Cal. 170; *Silvey v. Neary*, 59 id. 97; *White v. Douglass*, 71 id. 115; *Campe v. Lassen*, 67 id. 139; *Estate of Doyle*, 73 id. 564; *Machine Works v. Construction Co.*, 99 id. 421.

<sup>58</sup> *Carpentier v. Small*, 35 Cal. 346.

<sup>59</sup> *Swift v. Muygridge*, 8 Cal. 445; *Fox v. Fox*, 25 id. 587; *Burnett v. Stearns*, 33 id. 468; *Downer v. Sexton*, 17 Wis. 29; *Carlisle v. Mulhern*, 19 Mo. 56; *Gruhn v. Stanley*, 92 Cal. 86; *Johnson v. Vance*, 80 id. 257; *Drinkhouse v. Water Co.*, 87 id. 253; *Faulkner v. Rondoni*, 104 id. 140.

<sup>60</sup> *Taylor v. Palmer*, 31 Cal. 242; *Nosler v. Haynes*, 2 Nev. 56.

<sup>61</sup> *Gilson R. M. Co. v. Gilson*, 47 Cal. 567.

evidence is admitted on the trial, it is not error for the court to refuse to find a fact proved by such evidence.<sup>62</sup>

**§ 4646. Fraud.** A special finding on the question of fraud should always be taken.<sup>63</sup> Where an infant files a bill to set aside a decree for fraud in fact in procuring it, and for fraud because the decree does not reserve to the infant a day in court after coming of age to contest it, and the court finds against the infant on his charge of fraud in fact, the finding is conclusive of the whole case, unless there is a very clear mistake of the court as to the fact of fraud.<sup>64</sup> In an action against an attorney to set aside certain conveyances of property made to him by his client, on the ground of fraud practiced by the attorney in their procurement, and inadequacy of consideration, if to the contrary it be found that said consideration was fair and adequate, and that the client was willing to sell the property, then the further finding by the court that there was no fraud practiced by the attorney becomes immaterial for all purposes of the appeal by plaintiff.<sup>65</sup> In an action against a sheriff for wrongfully taking personal property, if he sets up that he took the same by virtue of an attachment, and that the goods were the

<sup>62</sup> *Hutchings v. Castle*, 48 Cal. 152. Where the parties stipulate in writing as to what the facts are, and file such stipulation in the answer, it is in all substantial respects the equivalent of admitting them in the pleadings. Such agreed statement takes the place and serves all the purposes of a formal finding by the court, and no other or more formal findings are required. *Muller v. Rowell*, 110 Cal. 318; *Gregory v. Gregory*, 102 id. 50. And it is well settled that findings need not be made upon immaterial issues. *Miller v. Luco*, 80 Cal. 257; *Souter v. McGuire*, 78 id. 543; *Diefendorff v. Hopkins*, 95 id. 343; *Groome v. Ogden City*, 10 Utah, 54; *Johnson v. Vance*, 86 Cal. 128. If the facts found sustain the judgment it is not necessary to go further and find upon other issues. *Malone v. Del Norte Co.*, 77 Cal. 217; *Dyer v. Brogan*, 70 id. 136; *So. Pac. R. R. Co. v. Dufour*, 95 id. 615; *Posachane Water Co. v. Standart*, 97 id. 476; *Tage v. Alberts*, 2 Idaho, 249; *Malone v. Bosch*, 104 Cal. 680; *Morrison v. Stone*, 103 id. 94; *Leek v. Hancock*, 76 id. 127; *Merrill v. Merrill*, 102 id. 317; see, also, *Ortega v. Cordero*, 88 id. 221; *Drinkhouse v. Water Co.*, 87 id. 253; *Merrill v. Clark*, 103 id. 367. No findings are necessary on the allegations of a cross-complaint to which a demurrer has been sustained and no amendment made. *Kendall v. Waters*, 68 Cal. 26; and see *Lion v. McClory*, 106 id. 623.

<sup>63</sup> *Davis v. Robinson*, 10 Cal. 411; *Gillan v. Metcalf*, 7 id. 137.

<sup>64</sup> *Regla v. Martin*, 19 Cal. 463.

<sup>65</sup> *Kisling v. Shaw*, 33 Cal. 425; 91 Am. Dec. 644.

property of the defendant in the attachment, and that he fraudulently sold them to this plaintiff, the court must find as to the issue of fraud thus raised.<sup>66</sup>

§ 4647. **General and special findings.** When the court sits as a jury in the trial of a cause, it must in all cases find the facts specially.<sup>67</sup> If discrepancy exists between the special and general findings in a case, the special findings must control.<sup>68</sup> Findings stating: 1. That the material allegations in plaintiff's complaint and replication are true; 2. That the material allegations in defendant's answer are not true — are insufficient in not specifying distinctly the allegations which are material.<sup>69</sup> So also a finding "that all the issues of fact raised by the pleadings are hereby found and decided in favor of the plaintiffs and against the defendant," is indefinite and insufficient.<sup>70</sup> It has been held, however, that a general finding by the court that "all the allegations and averments in plaintiff's complaint are true, and that all in the answer are untrue," is sufficient and conclusive of all the material issues made by said pleadings.<sup>71</sup>

§ 4647a. **Findings — trial by court without jury.** In an action tried by the court without the intervention of a jury, findings must be made on all the material issues.<sup>72</sup> The findings should cover all the material issues, and not merely such as may be sufficient to support the judgment.<sup>73</sup> It is not sufficient to say that it is impossible to make the finding. If no sufficient evidence be introduced the finding should be against the

<sup>66</sup> *Harris v. Burns*, 51 Cal. 528. In such actions, findings showing the situation of the parties and the circumstances under which the alleged fraud was committed are responsive to the issues, and not objectionable as being outside thereof. *Tage v. Alberts*, 2 Idaho, 249.

<sup>67</sup> *Breeze v. Doyle*, 19 Cal. 101.

<sup>68</sup> *Leese v. Clark*, 20 Cal. 387; *Hidden v. Jordan*, 28 id. 301; *Geer v. Sibley*, 83 id. 1; *Cox v. Delmas*, 99 id. 104; *Warder v. Enslen*, 73 id. 291; *Gates v. Railway Co.*, 2 S. Dak. 422.

<sup>69</sup> *Breeze v. Doyle*, 19 Cal. 101.

<sup>70</sup> *Johnson v. Squires*, 53 Cal. 37.

<sup>71</sup> *Pralus v. Pacific G. & S. M. Co.*, 35 Cal. 30; *Downer v. Sexton*, 17 Wis. 29; see, also, *Dougherty v. Ward*, 89 Cal. 81.

<sup>72</sup> *Drainage District v. Crow*, 20 Oreg. 535; *Jameson v. Coldwell*, 25 id. 199; *Sav. & Loan Soc. v. Thorne*, 67 Cal. 53; *Bennett v. Pardinl*, 63 id. 154; *Gull River Lumber Co. v. School District*, 1 N. Dak. 500; *Richardson v. Eureka*, 110 Cal. 441.

<sup>73</sup> *Potwin v. Blasher*, 9 Wash. St. 460.



party upon whom was the burden of proof.<sup>74</sup> But the failure of the trial court to find upon all the material issues raised by the pleadings is not prejudicial error, where the court finds upon an issue the determination of which controls the judgment, and where a finding in favor of the appellants upon every other issue would not justify a contrary judgment.<sup>75</sup> Where the ultimate facts in issue are found by the court, a contradictory finding as to a probative fact involved therein has no effect.<sup>76</sup> But when a material finding of fact is unsupported by the evidence, and is contradictory of other findings, the failure to make the finding in accordance with the evidence necessitates a new trial.<sup>77</sup>

§ 4648. **Jurisdiction.** If the findings of the court be that defendant was duly served with process, it is sufficient to establish the fact of jurisdiction on that ground.<sup>78</sup>

§ 4649. **Membership in company.** Where one defendant pleads that he is not a member of the company sued, and the court finds that the allegations of the complaint are true, and that he is a member of the company, as to plaintiff, Parke, the finding is sufficient.<sup>79</sup>

§ 4650. **Money deposit.** The finding of the court that money was deposited with one, to be held by him on deposit, and in trust for a party, is not open to the objection that it does not specify the kind of deposit.<sup>80</sup>

§ 4651. **Note.** Where the declaration was upon a note, and the court found that the note was never given, but that the indebtedness was for merchandise sold, it was held that the finding was against the averment, and could not support the judgment.<sup>81</sup>

<sup>74</sup> *Leviston v. Ryan*, 75 Cal. 293; *Monterey Co. v. Cushing*, 83 id. 510; and see *Demartin v. Demartin*, 85 id. 71.

<sup>75</sup> *Winhaus v. Bootz*, 92 Cal. 617; and see *Tage v. Alberts*, 2 Idaho, 250; *Joslyn v. Smith*, 2 N. Dak. 53, to the effect that a judgment will not be reversed for want of a finding upon a particular issue, where it is apparent that the omission in no way prejudiced the appellant. Also, *Murphy v. Bennett*, 68 Cal. 528.

<sup>76</sup> *Lucas v. Richardson*, 68 Cal. 618.

<sup>77</sup> *Felton v. Le Breton*, 92 Cal. 457.

<sup>78</sup> *Lick v. Stockdale*, 18 Cal. 219.

<sup>79</sup> *Parke v. Hinds*, 14 Cal. 415.

<sup>80</sup> *Schroeder v. Jahns*, 27 Cal. 274.

<sup>81</sup> *Lewis v. Myers*, 3 Cal. 475. A finding that a certain balance is due and owing from the defendant to the plaintiff upon the note



**§ 4652. Note and mortgage.** That "it appears from the note and mortgage sued on that there was due plaintiff, at the date of the commencement of this suit, for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, the sum of two thousand dollars," it is ordered, etc., is a sufficient finding of the execution and delivery of the note and mortgage.<sup>82</sup>

**§ 4653. Practice on findings.** The court should first ask counsel on both sides if they desire findings, and if they do, reserve its judgment, and direct each side to prepare and submit such questions of fact as they desire to have found.<sup>83</sup> And the party requiring a finding should specify the point upon which he desires it.<sup>84</sup> The court may file written findings, whether requested or not.<sup>85</sup> It is the right of the judge of the court to sign and file his findings, whether drafted by himself or another, without notice to the attorneys of the parties; and in doing so, his sole duty is to see that they are proper, and in conformity with his view of the facts and law of the case.<sup>86</sup> Neither evidence, argument, nor comment has any legitimate place in findings of fact or law.<sup>87</sup>

in suit states merely a conclusion of law, and is not a finding of fact covering the issue of nonpayment. *Ward v. Clay*, 82 Cal. 502; but see *Myers v. McDonald*, 68 id. 162. Finding as to law of another state, sufficiency of. *Tolman v. Smith*, 85 Cal. 280; finding in action for an accounting of trust funds. *Spencer v. Duncan*, 107 id. 423; in action for materials furnished and labor performed, insufficiency of. *Warren v. Robinson*, 71 id. 380; in action of partition, judgment reversed. *Reinhart v. Lugo*, 75 id. 639; as to value, in action of claim and delivery. *Johnson v. Fraser*, 2 Idaho, 371.

<sup>82</sup> *Holmes v. West*, 17 Cal. 623.

<sup>83</sup> *Tewksbury v. Magraff*, 33 Cal. 237; *Edgar v. Stevenson*, 70 id. 286.

<sup>84</sup> *Miller v. Stern*, 30 Cal. 402; 89 Am. Dec. 124.

<sup>85</sup> *Gay v. Moss*, 34 Cal. 125.

<sup>86</sup> *Hathaway v. Ryan*, 35 Cal. 188.

<sup>87</sup> *Glacius v. Black*, 50 N. Y. 145; 10 Am. Rep. 449; *Coveny v. Hale*, 49 Cal. 552; *Coglan v. Beard*, 65 id. 58. Evidential facts have no proper place in the findings. *Ornbaum v. His Creditors*, 61 Cal. 455; *Boskowitz v. Nickel*, 97 id. 19; *Blessing v. Sias*, 7 Mont. 103. The trial judge may himself prepare the findings, and is not required to adopt those prepared by counsel. *Barnhart v. Fulkerth*, 73 id. 526. Omission of judge's signature. See *Nat. Tube-Works Co. v. City of Chamberlain*, 5 Dak. 54. If the complaint be sufficient, a finding by reference to it is sufficient. *Gwinn v. Hamilton*, 75 Cal. 256.

**§ 4654. Presumptions.** That the findings were supported by the evidence,<sup>88</sup> and that evidence was competent and sufficient.<sup>89</sup> But where there is no issue tendered in the pleadings upon a material matter, the court or jury will not be presumed to have found on such matter.<sup>90</sup> Where there is no finding of facts incorporated in the case, the presumption is that the decision thereon was correct.<sup>91</sup>

**§ 4655. Separate statement in findings.** In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly.<sup>92</sup> Facts must be found and set forth separately from the conclusions of law.<sup>93</sup>

**§ 4656. Sufficient statement.** A finding of facts which is a mere recital of evidence, and does not conclusively establish the fact in issue, is not sufficient.<sup>94</sup> And the findings should warrant the conclusions of law and judgment thereon.<sup>95</sup> The facts, and not the evidence, should be set out.<sup>96</sup> Facts found should

<sup>88</sup> *Owen v. Morton*, 24 Cal. 377; *Jenkins v. Frink*, 30 id. 586; 89 Am. Dec. 134; *Horton v. Dominguez*, 68 Cal. 642.

<sup>89</sup> *Sears v. Dixon*, 33 Cal. 326; *Kendall v. Waters*, 68 id. 26; *Story v. Black*, 5 Mont. 26; *Spect v. Spect*, 88 Cal. 437.

<sup>90</sup> *Gifford v. Carvill*, 29 Cal. 589; *Bernal v. Gleim*, 33 id. 668.

<sup>91</sup> *Viele v. Troy & Boston R. R. Co.*, 20 N. Y. 184; *Matthews v. Mayor of New York*, 14 Abb. Pr. 214; consult "Appeal."

<sup>92</sup> Cal. Code Civ. Pro., § 633.

<sup>93</sup> *Bryan v. Maume*, 28 Cal. 238; *Church v. Erben*, 4 Sandf. 691; *Peck v. Yorks*, 14 How. Pr. 416; *Ragan v. McCoy*,<sup>9</sup> 26 Mo. 166; *Sutter v. Streit*, 21 id. 157; see, also, *Sharp v. Wright*, 35 Barb. 236; *Foot v. Murphy*, 72 Cal. 104; *Burton v. Burton*, 79 id. 490; *Anthony v. Jillson*, 83 id. 296; *Flisk v. Patton*, 7 Utah, 399.

<sup>94</sup> *Coveny v. Hale*, 49 Cal. 552; *Thomas v. Sprague*, 12 Mich. 120.

<sup>95</sup> *Pearce v. Burns*, 22 Mo. 577; *Pearce v. Roberts*, id. 582; *State v. Ruggles*, 23 id. 339; see, also, *Tomlinson v. Mayor of N. Y.*, 23 How. Pr. 452; *Rogers v. Beard*, 20 id. 98.

<sup>96</sup> *Heredink v. Holten*, 16 Cal. 103; *Kalkman v. Baylis*, 23 id. 303; *Javens v. Harris*, 20 Mo. 262; *Murdock v. Finney*, 21 id. 138; *Sutter v. Streit*, id. 157. If probative facts are found from which the court can declare that the ultimate facts necessarily result, the finding is sufficient. *Water Co. v. Richardson*, 72 Cal. 598; and see *Bull v. Bray*, 89 id. 286; compare *Perry v. Quackenbush*, 105 id. 299; *Gill v. Driver*, 90 id. 72. It is not necessary that findings should be in the exact language of the pleadings, or in any particular form. *Millard v. Legion of Honor*, 81 Cal. 340; *Clary v. Hazlitt*, 67 id. 286. Consult, also, as to sufficiency of findings, *Smith v. Mohn*, 87 Cal.

not be mingled with argument.<sup>97</sup> An opinion is not a finding;<sup>98</sup> but conclusions from facts are.<sup>99</sup> The opinions of the court, the reasons of the judge, or the evidence form no part of the findings.<sup>100</sup> Where the fact found by the judge, and the very one, in his opinion, upon which the case turns, is wholly unsupported by evidence, the appellate court will not treat such findings as surplusage in order to sustain the judgment on other findings, especially if the weight of testimony is against the other findings.<sup>101</sup>

**§ 4657. Sufficiency, test of.** The true test of the sufficiency of the findings is this: Would they answer if presented by a jury in the form of a special verdict?<sup>102</sup> Findings are sufficient when they cover all the issues made by the pleadings, whether supported by the evidence or not.<sup>103</sup> It is sufficient if the findings are not repugnant to or inconsistent with the judgment.<sup>104</sup>

**§ 4658. Waiver.** Findings of fact may be waived by the several parties to an issue of fact: 1. By failing to appear at the trial; 2. By consent in writing, filed with the clerk; 3. By oral consent in open court, entered in the minutes.<sup>105</sup> On appeal,

489; *Boskowitz v. Nickel*, 97 Id. 19; *Kane v. Rippey*, 22 Oreg. 299; *Thompson v. Russell*, 1 Okl. 225.

<sup>97</sup> *Bryan v. Maume*, 28 Cal. 238; *Jones v. Block*, 30 Id. 227.

<sup>98</sup> *McClory v. McClory*, 38 Cal. 575; *Johnston v. Sav. Union*, 75 Id. 134; *Yuma Co. v. Lovell*, 20 Col. 80.

<sup>99</sup> *Sears v. Dixon*, 33 Cal. 326.

<sup>100</sup> *James v. Williams*, 31 Cal. 311; *Mills v. Thursby*, 2 How. Pr. 417; *Thomas v. Tanner*, 14 Id. 426; *Magie v. Baker*, 14 N. Y. 435.

<sup>101</sup> *Lockhart v. Mackie*, 2 Nev. 294.

<sup>102</sup> *Breeze v. Doyle*, 19 Cal. 101.

<sup>103</sup> *Rice v. Inskeep*, 34 Cal. 225.

<sup>104</sup> *Sears v. Dixon*, 33 Cal. 326; *James v. Williams*, 31 Id. 211; see, also, *Walker v. Brem*, 67 Id. 599; *Withers v. Jacks*, 79 Id. 297; *Goodman v. Griswold*, 68 Id. 599; *Osment v. McElrat* Id. 466; *Winhaus v. Bootz*, 92 Id. 617; *Grant v. Sheerin*, 84 Id. 197.

<sup>105</sup> Cal. Code Civ. Pro., § 634. Waiver of findings. See *Sav., etc., Soc. v. Thorne*, 67 Cal. 53; *Campbell v. Coburn*, 77 Id. 36; *Western Lumber Co. v. Phillips*, 94 Id. 54; *Maguire v. Drew*, 83 Id. 225; *Finshen v. Malcolmson*, 96 Id. 38; *Eltzroth v. Ryand*, 91 Id. 584; *Gordon v. Donahue*, 79 Id. 501. *Findings — how construed.*— Findings can not be detached from each other and considered piecemeal. They must be read as a whole and not merely according to their numerical division. *Mott v. Ewing*, 90 Cal. 231; *Winterburn v. Chambers*,

the party who asserts as error the failure of the court below to file findings of fact must make it affirmatively appear, by bill of exceptions or other appropriate method, that no waiver of findings had occurred, or the intendments must go to support the judgment.<sup>106</sup> Where, however, findings are filed, but which do not include all the issues of fact involved in the case, no presumption of a waiver of findings can be indulged.<sup>107</sup> And in such case the findings must support the judgment.<sup>108</sup>

91 *id.* 170. They are to be liberally construed in support of a judgment. *Ames v. San Diego*, 101 Cal. 390; *Breeze v. Brooks*, 97 *id.* 72; they should be reconciled and harmonized wherever possible, and should not be declared contradictory except where absolutely necessary. *Schultz v. McLean*, 93 Cal. 329; and see *Felton v. Le Breton*, 92 *id.* 457; *Brison v. Brison*, 90 *id.* 323. If findings substantially cover the issues, the fact that they are clumsily drawn, and show upon their face an ambiguity due to erroneous capitalization and punctuation, will not be ground for reversal of the judgment. *Thompson v. Brannan*, 76 Cal. 618.

<sup>106</sup> *Mulcahy v. Glazier*, 51 Cal. 628; *Smith v. Lawrence*, 53 *id.* 34.

<sup>107</sup> *People v. Forbes*, 51 Cal. 628; *Majors v. Cowell*, *id.* 478.

<sup>108</sup> *Bosquett v. Crane*, 51 Cal. 505.

## CHAPTER IV.

### TRIAL BY JURY.

§ 4659. **In general.** Either party may bring the issue to trial or to a hearing, and in the absence of the adverse party, unless the court for good cause otherwise direct, may proceed with his case, and take a dismissal of the action, or a verdict, or judgment, as the case may require.<sup>1</sup> Either party may demand a jury to try the issues, as the right of trial by jury shall be secured to all, and remain inviolate forever.<sup>2</sup> The right to trial by jury is absolute, and can not be interfered with.<sup>3</sup> Where the sheriff is a party to the action, the court may order the cause tried by a special jury to be summoned by the coroner; and there being no coroner, an elisor may be appointed for that purpose.<sup>4</sup> The statute vests the ordering of a trial by jury in the discretion of the court.<sup>5</sup> In Oregon the court, having discharged the regular panel jurors in attendance, can not order another panel and compel the defendant to go to trial unwillingly.<sup>6</sup>

<sup>1</sup> Cal. Code Civ. Pro., § 594.

<sup>2</sup> Const. of Cal., art. 1, § 3.

<sup>3</sup> Greason v. Keteltas, 17 N. Y. 491; Sharp v. Mayor of N. Y., 18 How. Pr. 213; S. C., 9 Abb. Pr. 426; Lewis v. Varnum, 12 id. 305; People v. Powell, 87 Cal. 348; Pacific Railway Co. v. Wade, 91 id. 206. The right to a jury trial is not determined by the form of the action, but by the nature of the rights involved. An action to recover damages for trespass upon land being an action at law in which the parties thereto are entitled to a trial by jury, the fact that the plaintiff also asks for an injunction does not take away his right to have all the legal issues of fact tried by a jury. Hughes v. Dunlap, 91 Cal. 385. Jury trial in action to recover real property. Newman v. Duane, 89 Cal. 597; in action for divorce. Pleyte v. Pleyte, 1 Col. App. 70. As to the propriety of a trial by jury where there is an issue of fraud, see Freeman v. Atlantic Mut. Ins. Co., 13 Abb. Pr. 124.

<sup>4</sup> Pacheco v. Hunsaker, 14 Cal. 120.

<sup>5</sup> Id. Appointment of elisor. See Bruner v. Superior Ct., 92 Cal. 239; People v. Irwin, 77 id. 494; People v. Yeaton, 75 id. 415.

<sup>6</sup> Mousseau v. Veeder, 2 Oreg. 113.

§ 4660. **Impaneling jury.** The action being called for trial, the jury will be drawn and impaneled in the manner prescribed by statute.<sup>7</sup> It shall consist of twelve persons, unless the parties consent to a less number; and such consent must be entered by the clerk in the minutes of the trial, and can not be inferred from the mere absence of the party.<sup>8</sup> In California three-fourths of the jury are competent to render a verdict.<sup>9</sup>

Upon demand of either party for a jury trial, the court will order a venire to issue. The time provided by the statute in which the jury shall be returned by the sheriff is directory.<sup>10</sup> If a party waits until the trial is entered upon before applying for a jury trial, it is a waiver of his right.<sup>11</sup> The first act done by the clerk is to take the panel returned by the sheriff, so far as they have appeared, and not been excused by the court, and copy the names upon separate ballots, which he then puts in a box provided for that purpose. When a case is called for trial by jury, he is to draw twelve names from the box, and call them off as he draws them.<sup>12</sup> The persons so drawn and called are to take their seats in the jury-box. If there are not twelve ballots in the box, the sheriff, under the direction of the court, is to summon from the body of the county, and not from by-standers, so many qualified persons as may be required to complete the jury.<sup>13</sup> When the jury-box is full, and not before, counsel are to proceed to examine them touching their qualifications. Each party may examine the whole twelve before making any peremptory challenges, and if any are excused for cause, the deficiency must be supplied by calling other jurors, who may be examined in like manner until there are twelve who are adjudged by the court to be competent; and thereupon each party may challenge

<sup>7</sup> Cal. Code Civ. Pro., § 600; Laws of Oregon, § 178; Washington, § 339; Idaho, § 159; Arizona, § 161.

<sup>8</sup> Gillespie v. Benson, 18 Cal. 410; United States v. Insurgents of Penn., 2 Dall. 335; Bonaparte v. Camden & Amboy R. R. Co., Baldw. 205; Cal. Code Civ. Pro., § 194. Presumption as to consent. Hitchcock v. Caruthers, 82 Cal. 523.

<sup>9</sup> Code Civ. Pro., § 613. So, in Utah. Hess v. White, 9 Utah, 61; Publishing Co. v. Brewing Co., 10 id. 147. Otherwise in Oklahoma. Bradford v. Territory, 1 Okl. 366.

<sup>10</sup> Mowry v. Starbuck, 4 Cal. 274; People v. Ferris, 1 Abb. Pr. (N. S.) 193.

<sup>11</sup> McKeon v. See, 4 Robt. 449; Barlow v. Scott, 24 N. Y. 40; see § 4633, *ante*.

<sup>12</sup> Cal. Code Civ. Pro., § 600.

<sup>13</sup> Id., § 227.

peremptorily, but he can not be required to do so before.<sup>14</sup> The essential difference between the civil and criminal practice is that in the former none are to be sworn to try the case until the jury is complete, while in the latter those accepted may be sworn to try the case before the jury is finally completed.<sup>15</sup> Drawing of jurors under Washington practice.<sup>16</sup>

**§ 4661. Qualifications of jurors.** No one shall be qualified to act as a juror unless he be: 1. A citizen of the United States, an elector of the county in which he is returned, whether his name be on the great register or not, and a resident of the township at least three months before being selected and returned.<sup>17</sup> Residence depends upon intention as well as fact, and mere inhabitancy for a short period, against the intention of acquiring a domicile, would not make a resident.<sup>18</sup> A citizen of California, who has resided in the county fourteen days, and then been absent some months from the State, with the intention of returning to reside in the county, and has returned and resided in the county some fourteen days, is a competent juror.<sup>19</sup> 2. In possession of his natural faculties.<sup>20</sup> 3. One who has sufficient knowledge of the language in which the proceedings of the courts are had.<sup>21</sup> 4. Assessed on the last assessment-roll of his township or county, on real or personal property, or both, belonging to him.<sup>22</sup> A person is not competent to act as a juror who does not possess the above qualifications, or who has been convicted of a felony or misdemeanor involving moral turpitude.<sup>23</sup> The jury having been called are sworn to answer

<sup>14</sup> Taylor v. W. P. R. R. Co., 45 Cal. 330; People v. Scoggins, 37 Id. 680; see § 4663, *post*.

<sup>15</sup> People v. Scoggins, *supra*.

<sup>16</sup> See Code of Wash., § 339. When special venire may issue under Montana practice. See Dupont v. McAdow, 6 Mont. 226; see, also, Chandler v. Colcord, 1 Okl. 260.

<sup>17</sup> Cal. Code Civ. Pro., § 198; see, also, Cal. Pol. Code, §§ 1083, 1084. It is proper to excuse from the jury a person who is not a citizen of the United States and who has never declared his intention to become such. Babcock v. People, 13 Col. 515.

<sup>18</sup> People v. Peralta, 4 Cal. 175; see Pol. Code, § 52.

<sup>19</sup> People v. Stoneclifer, 6 Cal. 405; Const. Cal., art. 11, § 19.

<sup>20</sup> Cal. Code Civ. Pro., § 40.

<sup>21</sup> Id.; see People v. Arceo, 32 Cal. 40.

<sup>22</sup> Cal. Code Civ. Pro., § 40; People v. Thompson, 34 Cal. 671; Valton v. Nat. Loan Fund Ins. Co., 17 Abb. Pr. 268.

<sup>23</sup> Cal. Code Civ. Pro., § 199. As to when persons shall be exempt from liability to serve as a juror, see Id., § 200.

questions relative to their qualifications as jurors to hear the particular case then on trial. They are then questioned by counsel of either side as to their knowledge of the parties or the facts of the case, or as to whether they have formed or expressed an opinion of the merits of the cause, or upon any other question touching their fitness or fairness as jurors, not only to show that there exists proper grounds for a challenge for cause, but to elicit facts to enable him to decide whether he will make a peremptory challenge.<sup>24</sup>

§ 4662. **Objections to the panel.** Objections to the panel may be interposed for an irregularity in the formation of the jury, which goes to the merits of the trial or leads to the inference of improper influence upon their conduct.<sup>25</sup> In Oregon, no challenge to the panel is allowed.<sup>26</sup> No objection being taken to the manner of impaneling a jury, it is waived.<sup>27</sup> In Nevada, a challenge to the panel of trial jurors must be in writing, specifically stating the grounds of challenge or facts on which the challenge is based.<sup>28</sup> In New York, upon the challenge of the array, the practice is, that if the facts are denied, the court appoints triers, and if they pronounce the cause of challenge unfounded, the trial proceeds. If the facts are admitted, the court passes upon their sufficiency, and either quashes the array or overrules the challenge.<sup>29</sup> No regular panel having been drawn and summoned, the court ordered thirty-six jurors to be summoned, twenty-seven of whom appearing, the court caused their names to be put in a box, from which twelve were drawn to constitute a trial panel; it was held not to be ground for challenge to the whole panel.<sup>30</sup> But where the clerk drew seventy-two names out of the box, and selected thirty-six of them, it was a good ground of challenge to the array.<sup>31</sup> That a jury has just tried a case involving the liability of defendant for a similar cause of action does not render it incompetent.<sup>32</sup> So

<sup>24</sup> *Watson v. Whitney*, 23 Cal. 376.

<sup>25</sup> *Thrall v. Smiley*, 9 Cal. 529.

<sup>26</sup> *Laws of Oreg.*, § 179.

<sup>27</sup> *Dayharsh v. Enos*, 5 N. Y. 531; *Mayor of N. Y. v. Mason*, 1 Abb. Pr. 352; *Hardenburgh v. Crary*, 15 How. Pr. 307.

<sup>28</sup> *State v. Millain*, 3 Nev. 411; and see *State v. Gray*, 19 id. 212.

<sup>29</sup> *Gardner v. Turner*, 9 Johns. 260.

<sup>30</sup> *People v. Stuart*, 4 Cal. 218.

<sup>31</sup> *Gardner v. Turner*, 9 Johns. 260.

<sup>32</sup> *Algiers v. Steamer Maria*, 14 Cal. 167.



if the venire is executed and returned by any other person than the sheriff.<sup>33</sup> So where the sheriff who served the venire was a party to the action.<sup>34</sup> For default or partiality in the clerk, or if the clerk select the jury instead of drawing by lot.<sup>35</sup> But an objection on the ground that the jury was summoned by order of the court, after the commencement of the term, is no ground of challenge to the panel.<sup>36</sup> A jury drawn while the court was in session, in the presence of the court and its officers, must be held to have been drawn in open court, whether it was done in the room where the court usually sits or in another.<sup>37</sup> The object is to secure honest and intelligent men for the jury, and the order or time in which they are served is of no consequence.<sup>38</sup> A variance between the true name of a juror and that placed on the jury list is immaterial, if it satisfactorily appears that the person attending is the one really selected.<sup>39</sup> Nor that the name of a juror was not on the venire return by the sheriff.<sup>40</sup> In New York, it is no ground of challenge to the array that the clerk who drew the jury was at the time attorney in the cause.<sup>41</sup> Nor that juries for two courts were drawn from the box at the same time, the two sets of names being kept distinct.<sup>42</sup>

§ 4663. **Challenge to juror.** After questioning the jurors, counsel may challenge, either peremptorily or for cause. Each party shall be entitled to four peremptory challenges, and no reason need be given for the exercise of this right.<sup>43</sup> In Oregon and Washington only three peremptory challenges are allowed.<sup>44</sup> Either party may exercise his right of peremptory challenge at any time after examination, but neither party can be required to exercise it prior to this stage of the proceedings.<sup>45</sup> And when there are several parties on either side, they shall join in a

<sup>33</sup> *Cooper v. Blissell*, 16 Johns. 146.

<sup>34</sup> *Wood v. Rowan*, 5 Johns. 133.

<sup>35</sup> *Pringle v. Huse*, 1 Cow. 432; *Gardner v. Turner*, 9 Johns. 260.

<sup>36</sup> *People v. Rodriguez*, 10 Cal. 59.

<sup>37</sup> *State v. Millain*, 3 Nev. 411.

<sup>38</sup> *Thrall v. Smiley*, 9 Cal. 529.

<sup>39</sup> *State v. McNamara*, 3 Nev. 71.

<sup>40</sup> *Thrall v. Smiley*, 9 Cal. 529.

<sup>41</sup> *Wakeman v. Sprague*, 7 Cow. 720.

<sup>42</sup> *Crane v. Dygert*, 4 Wend. 675.

<sup>43</sup> Cal. Code Civ. Pro., § 601; Laws of Idaho, § 161; Arizona, § 163.

<sup>44</sup> Laws of Oregon, § 187; Wash. Code, § 340.

<sup>45</sup> *People v. Scoggins*, 37 Cal. 680; *Taylor v. W. P. R. R. Co.*, 45 Id. 830.

challenge before it can be made.<sup>46</sup> Where only one peremptory challenge is shown to have been used, it is presumed the other three were not used.<sup>47</sup> If no peremptory challenges are taken until the panel is full, they must be taken by the parties alternately, commencing with the plaintiff.<sup>48</sup> In California, a general challenge of a juror for cause, without specifying the particular grounds, is insufficient; it is not sufficient to say, "I challenge for cause," and then stop.<sup>49</sup>

**§ 4664. Grounds of challenge.** A challenge for cause, in California, may be made on one or more of the following grounds: 1. A want of any of the qualifications prescribed by the Code to render a person competent as a juror;<sup>50</sup> 2. Consanguinity, or affinity, within the fourth degree, to any party;<sup>51</sup> the degree of kindred is established by the number of generations, and each generation is called a degree;<sup>52</sup> in the direct line there are as many degrees as there are generations;<sup>53</sup> in the collateral line the degrees are counted by generations, from one of the relations up to the common ancestor, and from the common ancestor to the other relation; in such computation the decedent is excluded, the relation included, and the ancestor counted but once; thus brothers are related in the second degree, uncle and nephew in the third degree, and cousins-german in the fourth, and so on.<sup>54</sup> 3. Standing in the relation of guardian and ward, master and servant, employer and clerk, or principal

<sup>46</sup> Cal. Code Civ. Pro., § 601.

<sup>47</sup> *Fleeson v. Savage Silver Min. Co.*, 3 Nev. 157.

<sup>48</sup> Cal. Code Civ. Pro., § 601. As to right of challenge and its exercise, see, generally, *Walter v. People*, 32 N. Y. 147. It is proper practice to leave twelve jurors in the box before requiring the parties to exercise their peremptory challenges, and then to call another juror whenever a peremptory challenge shall have been exercised. *Silcox v. Lang*, 78 Cal. 118. Then the parties are to challenge alternately, and if one of them does not exercise his right of challenge in his turn, after the other party has expressed his satisfaction with the full panel, he can not afterward be allowed another peremptory challenge. *Vance v. Richardson*, 110 Cal. 414.

<sup>49</sup> *Paige v. O'Neal*, 12 Cal. 483.

<sup>50</sup> Cal. Code Civ. Pro., § 602.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*, § 1389.

<sup>53</sup> *Id.*, § 1392.

<sup>54</sup> *Id.*, § 1393. As to incompetency of jurors from relationship or interest, see *Young v. Marine Ins. Co.*, 1 Cranch C. C. 452; *Common Council of Alexandria v. Brockett*, *id.* 505; *Orme v. Pratt*, 4 *id.* 124.

and agent to either party, or being a member of the family of either party, or a partner in business with either party, or surety on any bond or obligation for either party;<sup>55</sup> a tenant of either of the parties to the suit is incompetent.<sup>56</sup> 4. Former service as juror or witness on a previous trial, between the same parties, for the same cause of action. 5. Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation. Jurors must be wholly disinterested.<sup>57</sup> 6. Having an unqualified opinion or belief as to the merits of the action, founded upon knowledge of its material facts, or of some of them. The former provision, as found in section 162 of the California Practice Act, has been materially changed by striking out the words "formed or expressed," and adding the words "founded upon knowledge of its material facts, or of some of them." Under the present California Code, in order to disqualify, there must be a present unqualified opinion, founded upon knowledge of material facts. Simply "knowing and being aware of the circumstances connected with the affair" is not sufficient grounds.<sup>58</sup> A juror having said that "if the reports of the neighbors were correct, the defendant was wrong, and the plaintiff was right," it was held not sufficient ground for challenge.<sup>59</sup> It is only an unqualified opinion in the mind of the juror that disqualifies.<sup>60</sup> 7. The

<sup>55</sup> Cal. Code Civ. Pro., § 602.

<sup>56</sup> *Hathaway v. Helmer*, 25 Barb. 29.

<sup>57</sup> *Wood v. Stoddard*, 2 Johns. 194. That a person called as a juror is acquainted with the attorney of one of the parties to the suit and had been employed at one time to do certain legal business, is not sufficient ground upon which to base a challenge for cause. *Fairbanks v. Irwin*, 15 Col. 366. Challenge for cause properly sustained. See *Denver, etc., R. R. Co. v. Driscoll*, 12 Col. 520.

<sup>58</sup> *Lawrence v. Collier*, 1 Cal. 38; see, also, *Collins v. Burns*, 16 Col. 7; *State v. Sheerin*, 12 Mont. 539. The opinion, to disqualify one as juror, must be an abiding bias of the mind, based upon the substantial facts in the case, in the existence of which he believes. *Haugen v. Chicago, etc., Railway Co.*, 3 S. Dak. 394. To the same effect, see *People v. Cochran*, 61 Cal. 548; *McHugh v. State*, 42 Ohio St. 154; *Dolan v. State*, 40 Ark. 454; *State v. Meyer*, 58 Vt. 457; *Murphy v. State*, 15 Neb. 383; *The Anarchists' Case*, 123 U. S. 131. Dismissal of juror for cause after completion of panel. See *Lawlor v. Linforth*, 72 Cal. 205.

<sup>59</sup> *Durell v. Mosher*, 8 Johns. 445.

<sup>60</sup> *State v. Millain*, 3 Nev. 409; see *People v. Symonds*, 22 Cal. 348; 87 Am. Dec. 95; *People v. King*, 27 Cal. 512; 87 Am. Dec. 95; *People*

existence of a state of mind in the juror evincing enmity against or bias to or against either party.<sup>61</sup> Bias or prejudice of any kind is good ground for challenge under the seventh subdivision.<sup>62</sup> Prejudice, being a state of mind more frequently founded in passion than in reason, may exist with or without a cause, and in the eye of the law has no degrees.<sup>63</sup> Actual bias may be taken for the existence of such a state of mind that he can not try the issue impartially.<sup>64</sup> To ask a person whether he is prejudiced or not against a party, and if so, whether that prejudice is of such a character as would lead him to deny the party a fair trial, is the simplest method of ascertaining the state of his mind.<sup>65</sup> A mason or a royal arch mason is not disqualified from sitting on a jury where another mason of the same degree is a party.<sup>66</sup>

**§ 4665. Challenge, how tried.** Challenges for cause must be tried by the court, and witnesses may be examined. The juror challenged, and any other person, may be examined as a witness on the trial of the challenge.<sup>67</sup> In New York, the challenge for favor or bias may be tried by the triers;<sup>68</sup> but for

*v. Murphy*, 45 Cal. 141; *People v. Johnston*, 46 id. 78; *People v. Well*, 40 id. 268.

<sup>61</sup> Cal. Code Civ. Pro., § 602, subd. 7; Laws of Idaho, § 162; Laws of Arizona, § 164.

<sup>62</sup> *People v. Reyes*, 5 Cal. 347; *Smith v. Floyd*, 18 Barb. 522; *Chouteau v. Pierre*, 9 Mo. 3.

<sup>63</sup> *People v. Reyes*, 5 Cal. 347.

<sup>64</sup> Laws of Oregon, § 185; 3 Den. 124; *People v. Wong Ark*, 96 Cal. 125; *People v. Wells*, 100 id. 227. Challenge, how taken. Laws of Oregon, §§ 188, 189.

<sup>65</sup> *People v. Reyes*, 5 Cal. 347. The law contemplates that the minds of jurors shall be free from such impressions of the merits as amount to a conviction or prejudgment of the case. *Denver, etc., R. R. Co. v. Moynahan*, 8 Col. 56.

<sup>66</sup> *Purple v. Horton*, 13 Wend. 9; 27 Am. Dec. 167.

<sup>67</sup> Cal. Code Civ. Pro., § 603; *Pringle v. Huse*, 1 Cow. 432; *Mechanics & Farmers' Bank v. Smith*, 19 Johns. 115. Within reasonable limits, counsel have a right to put questions to jurors upon their *voir dire*, not only for the purpose of ascertaining whether grounds exist for challenges for cause, but also for the purpose of intelligently exercising their peremptory challenges. Beyond this, the matter of examination rests almost entirely in the discretion of the trial judge. *Un. Pac. Railway Co. v. Jones*, 21 Col. 340. In practice, great latitude is and generally ought to be indulged. *State v. Chapman*, 1 S. Dak. 414; see *Territory v. Lopez*, 3 N. Mex. 104.

<sup>68</sup> *Pringle v. Huse*, 1 Cow. 432; *Freeman v. People*, 4 Den. 9; 47 Am. Dec. 216; *Smith v. Floyd*, 18 Barb. 522.

having expressed an opinion upon the merits of the action, it must be tried by the court.<sup>69</sup> When a judge, by consent of parties, acts as trier upon the challenge of a juror, his rejection of evidence is final, and can not be reviewed on appeal.<sup>70</sup> The decision of the court is a decision as to fact, not law, and the Supreme Court would not, except in the clearest case, interfere with its decision.<sup>71</sup> If a juror is challenged for cause, etc., that challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise the inference that the challenging party is thereby injured.<sup>72</sup> A party who accepts a juror, knowing him to be disqualified, waives the objection.<sup>73</sup>

§ 4666. **Jury sworn.** The challenges having been exhausted, or exercised to the satisfaction of the parties, the jury is sworn that they, each of them, will well and truly try the matter in issue between . . . . ., the plaintiff, and . . . . ., the defendant, and a true verdict render according to the evidence.<sup>74</sup> Where, before the trial of an action of *assumpsit*, brought against three persons, two of the defendants confess judgment, but the damages have not been assessed, it is proper to swear the jury as to the remaining defendant.<sup>75</sup>

§ 4667. **Evidence adduced.** The jury having been sworn to try the case, counsel for plaintiff states briefly the issue and his case, and then introduces his proofs, upon the close of which defendant states the nature of his defense, set-off, or counter-claim, as the case may be, and proceeds with his proofs. In all cases courts take judicial notice of certain facts. In California these are enumerated in the Code of Civil Procedure, section 1875, and are the following: "1. The true signification of all English words and phrases, and of all legal expressions; 2. Whatever is established by law; 3. Public and private official acts of the legislative, executive, and judicial departments of this state and of the United States; 4. The seals of all the

<sup>69</sup> *Pringle v. Huse*, 1 Cow. 432.

<sup>70</sup> *Costigan v. Cuyler*, 21 N. Y. 134.

<sup>71</sup> *Trenor v. O. P. R. R. Co.*, 50 Cal. 230; see, also, *Salazar v. Taylor*, 18 Col. 538; *Babcock v. People*, 13 id. 515; *Haugen v. Chicago*, etc., R. R. Co., 3 S. Dak. 394; *Collins v. Burns*, 16 Col. 7.

<sup>72</sup> *Fleeson v. Savage Silv. Min. Co.*, 3 Nev. 157.

<sup>73</sup> *People v. Stonecipher*, 6 Cal. 411.

<sup>74</sup> Cal. Code Civ. Pro., § 604.

<sup>75</sup> *Noble v. Laley*, 50 Penn. St. 281.

courts of this state and of the United States; 5. The accession to office, and the official signatures and seals of office, of the principal officers of government in the legislative, executive, and judicial departments of this state and of the United States; 6. The existence, title, national flag, and seal of every state or sovereign recognized by the executive power of the United States; 7. The seals of courts of admiralty and maritime jurisdiction, and of notaries public; 8. The laws of nature, the measure of time, and the geographical divisions and political history of the world. In all these cases the court may resort for its aid to appropriate books or documents of reference."<sup>75a</sup> The court is to declare such knowledge to the jury, who are bound to accept it.<sup>76</sup>

**§ 4668. Privileged communications—attorney and client.** Confidential communications made by a client to an attorney respecting the business he is employed to transact are privileged, and the attorney can not be compelled to disclose them; but the matter must be communicated to the attorney professionally and in the usual course of business. But statements made by the client to other persons at the time, or by other persons to him, are not privileged, and the attorney is bound to disclose them the same as any other witness.<sup>77</sup> If,

<sup>75a</sup> Cal. Code Civ. Pro., § 1875.

<sup>76</sup> Id., § 2102. For other matters prescribed or defined by the California Code of Civil Procedure, consult the same, under the titles Evidence, Witnesses, Writings Public and Private, Estoppels, Presumptions, Rules of Examination, Effect of Evidence, Evidence in Particular Cases, etc. See, also, *Grennan v. McGregor*, 78 Cal. 258; *Campbell v. West*, 86 id. 197; *City of Santa Cruz v. Enright*, 95 id. 105. The courts will take judicial notice of "whatever is established by law." *People v. Etting*, 99 Cal. 577. Matters of which a court takes judicial notice are uniform and fixed, and do not depend upon uncertain testimony. *Hunter v. Railroad Co.*, 116 N. Y. 615; *Rogers v. Cady*, 104 Cal. 288. They take judicial notice of the true meaning of all legal expressions, including all the terms used in the Constitution or in acts of the Legislature. *Sheehy v. Shinn*, 103 Cal. 325; and see *People v. Harrison*, 107 id. 541; *Power v. Bowdle*, 3 N. Dak. 107; *Goodwin v. Scheerer*, 106 Cal. 690. The laws of Spain and Mexico which were in force in California prior to its conquest will be judicially noticed. *Ohm v. San Francisco*, 92 Cal. 437.

<sup>77</sup> *Gallagher v. Williamson*, 23 Cal. 331; 83 Am. Dec. 114; Cal. Code Civ. Pro., § 1181, subd. 2, as amended by act of March 23, 1893; *Hager v. Schindler*, 29 Cal. 72; see *Story's Eq. Pl.* 601; *Gove v.*

pending the relation of client and attorney, the client communicates to the attorney a fact foreign to the object for which the attorney was retained, the communication is not confidential.<sup>78</sup> If, after final judgment, he makes disclosures respecting subjects of the foregone employment, the communications are not privileged.<sup>79</sup> If the attorney receives a deed of the client's property without consideration, and then, at the client's request, deeds the property to another person without consideration, these facts are not privileged communications, and the attorney may be required to disclose them as a witness in a suit by a creditor to cancel the deeds.<sup>80</sup> Where the attorney, when examined as a witness, was unable to state whether an accused person had made certain admissions to him, or whether they were disclosed while the accused was under examination as a witness in his own behalf, the court should have excluded the testimony of its own motion. The accused should have had the benefit of the doubt.<sup>81</sup> The privilege applies to the communication, and it is immaterial whether the client is or is not a party to the action in which the question arises, or whether the disclosure is sought from the client or from his legal adviser; and this privilege is not affected by the statutes making parties witnesses.<sup>82</sup> A party having given evidence in chief on his own behalf can not, on cross-examination, be compelled to divulge statements made by him when consulting as a client an attorney-at-law, such communication being privileged as well when the client is a witness as when the attorney is a witness.<sup>83</sup> Where the accused in a criminal trial

Harris, 8 Eng. L. & Eq. 149. A client can not be compelled to disclose communications which his attorney can not be permitted to disclose. *Verdelli v. Gray's, etc., Commercial Co.*, 115 Cal. 517.

<sup>78</sup> *Hager v. Shindler*, 29 Cal. 48.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *People v. Atkinson*, 40 *id.* 285.

<sup>82</sup> *Montgomery v. Pickering*, 116 Mass. 227; *Brand v. Brand*, 39 How. Pr. 193; *Barker v. Kuhn*, 38 Iowa, 395. An attorney's secretary, stenographer, or clerk can not be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity. Cal. Code Civ. Pro., § 1881, subd. 2, as amended by act of March 23, 1893.

<sup>83</sup> *Bigler v. Ryker*, 43 Ind. 112; *Hemenway v. Smith*, 28 Vt. 701; *Bobo v. Bryson*, 21 Ark. 387; 76 Am. Dec. 404. To the contrary is *Inhabitants of Woburn v. Henshaw*, 101 Mass. 200.



becomes a witness in his own behalf, he can not be compelled on cross-examination to disclose confidential communications between himself and his attorneys.<sup>84</sup>

**§ 4669. Husband and wife.** A husband can not be examined for or against his wife without her consent, nor a wife for or against her husband without his consent, nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.<sup>85</sup>

**§ 4670. Physician.** A licensed physician or surgeon can not, without the consent of his patient, be examined as a witness as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.<sup>86</sup>

**§ 4671. Priest.** A clergyman or priest can not, without the consent of the person making the confession, be examined as to any confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.<sup>87</sup>

**§ 4672. Public officer.** A public officer can not be examined as a witness as to communications made to him in official confidence, when the public interests would suffer by the disclosure.<sup>88</sup> But a judge or any juror may be a witness.<sup>89</sup>

**§ 4673. Witnesses in general.** Where the answer of a witness would tend to subject him to punishment for a felony, he

<sup>84</sup> *Duttenhofer v. State*, 34 Ohio St. 91; 32 Am. Rep. 362. Privilege of professional communications. See Weeks on Attorneys (2d ed.), chap. 8.

<sup>85</sup> Cal. Code Civ. Pro., § 1881, subd. 1; see *People v. Mullings*, 83 Cal. 138.

<sup>86</sup> *Id.*, subd. 4; see *Wheelock, Godfrey*, 100 Cal. 578; *In re Flint*, 100 id. 391; *Harris v. Zanone*, 93 id. 59; *Valensin v. Valensin*, 73 id. 106. The rule as to privileged communications between patient and physician does not apply in criminal cases. *People v. Lane*, 101 Cal. 513.

<sup>87</sup> *Id.*, subd. 3; see *Est. of Toomes*, 54 Cal. 509.

<sup>88</sup> *Id.*, subd. 5.

<sup>89</sup> *Id.*, § 1883.



is privileged from answering, on the ground solely that he is not compelled to criminate himself.<sup>90</sup> The only case where a witness is privileged, on the ground that his answer would disgrace him, is when it is not pertinent to the issue.<sup>91</sup>

**§ 4674. Who may be witnesses.** In California, and generally throughout the United States, all persons, with few exceptions, who having organs of sense can perceive, and perceiving can make known their perceptions to others, may be witnesses. Therefore, neither parties nor other persons who have an interest in the event of an action or proceeding are excluded; nor those who have been convicted of crime; nor persons on account of their opinions on matters of religious belief; although, in every case, the credibility of the witness may be drawn in question.<sup>92</sup> The following persons can not be witnesses: 1. Those who are of unsound mind at the time of their production for examination; 2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly; 3. Parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted, against an executor or administrator, upon a claim or demand against the estate of the deceased.<sup>93</sup>

**§ 4675. Children.** There is no precise age within which children are excluded from giving testimony. Their competency is to be determined by the court, not by their age, but by the degree of their understanding and knowledge.<sup>94</sup> And if over ten years of age, the presumption is that they possess the requisite knowledge and understanding; but if under that age, the presumption is otherwise, and it must be removed upon their examination by the court, or under its direction and its presence, before they can be sworn.<sup>95</sup> Where a witness, being sworn, stated that he was fourteen years old and a Chileno, and did not know "the obligation of an oath," whereupon the judge explained to him the nature of such obligation, and he was then permitted to testify, the other party objecting that he did not know the obligation of an oath, it was held that

<sup>90</sup> *Ex parte Rowe*, 7 Cal. 184.

<sup>91</sup> *Id.*; see Cal. Code Civ. Pro., § 2065.

<sup>92</sup> Cal. Code Civ. Pro., § 1879.

<sup>93</sup> *Id.*, § 1880.

<sup>94</sup> *People v. Bernal*, 10 Cal. 66.

<sup>95</sup> *Id.*; see *In re Johnson*, 98 Cal. 549; *People v. Welsh*, 63 *id.* 167.

the witness was competent.<sup>96</sup> But a deaf and dumb child, about nine years of age, who has no idea of an oath, and who can not be made to understand questions asked him, is not competent.<sup>97</sup>

§ 4676. **Parties to suits.** The provision of the California Code of Civil Procedure, section 1880, subdivision 3, applies not only to parties who have, or are supposed to have, an interest adverse to the estate of the defendant, but by its terms renders all the nominal parties to the action incompetent.<sup>98</sup> In an action against an executor upon a claim against his testator, the deposition of the plaintiff can not be received in evidence since the amendment to the Code of Civil Procedure, which took effect July 1, 1874, even if the deposition was taken before said amendment was passed.<sup>99</sup> But the executor or administrator is not prohibited from calling a party to the action to testify in behalf of the estate.<sup>100</sup>

§ 4677. **Partner surviving.** In Nevada, when a surviving partner is sued for a loan for the use of the firm, made to a deceased partner, and of the particulars of which the deceased partner only was cognizant, the plaintiff is not a competent witness in his own behalf.<sup>101</sup>

<sup>96</sup> Fuller v. Fuller, 17 Cal. 605.

<sup>97</sup> Territory v. Duran, 3 N. Mex. 134.

<sup>98</sup> Blood v. Fairbanks, 50 Cal. 421; see Fox v. Tay, 89 id. 339; Uhlhorn v. Goodman, 84 id. 185; Moore v. Schofield, 96 id. 486. This provision of the Code has no application to a party claiming a family allowance. Est. of McCausland, 52 Cal. 568.

<sup>99</sup> Mitchell v. Haggemeyer, 51 Cal. 108. Under the Colorado statute, no party to any civil action, suit or proceeding, or person directly interested in the event thereof, is competent to testify therein of his own motion, or in his own behalf, when the adverse party sues or defends as the executor or administrator of a deceased person. Williams v. Carr, 4 Col. App. 363; and see Fetta v. Vandevier, 3 id. 419; approved, 20 Col. 368; Jones v. Henshall, 3 Col. App. 448; Carpenter v. Ware, 4 id. 458; and this prohibition is the same in equity as at law. Williams v. Carr, 4 id. 368. Participation of court in the examination of a party testifying in his own behalf. See Baur v. Beall, 14 Col. 383. Examination of parties as witnesses, concerning their feelings towards one another. Stewart v. Kindel, 15 Col. 539.

<sup>100</sup> Chase v. Evoy, 51 Cal. 618; and see Sedgwick v. Sedgwick, 52 id. 336; McGregor v. Donnelly, 67 id. 149; Levy v. Dwight, 12 Col. 101.

<sup>101</sup> Roney v. Buckland, 4 Nev. 45.

§ 4678. **Religious belief.** Under the California Constitution, a witness is competent, without respect to his religious belief, or independent thereof.<sup>102</sup>

§ 4679. **Practice on evidence—contradictory statements.** Where a witness is subject to be impeached by proof of contradictory statements, the precise matter of these contradictions, and the time and place of the statements, must be brought to the knowledge of the witness on cross-examination.<sup>103</sup> This rule applies equally to evidence of declaration or acts of hostility or of ill feeling on the part of the witness.<sup>104</sup> It is in the discretion of the court to admit such impeaching evidence, and the party offering such evidence must show error to his prejudice, by putting his exceptions to the ruling of the court in proper shape.<sup>105</sup> If the deposition of a witness has been introduced on behalf of one party, the other may prove his confessions or declarations for the purpose of contradicting his deposition or impeaching his credit.<sup>106</sup> The party calling a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times statements inconsistent with his present testimony.<sup>107</sup>

§ 4680. **Cross-examination.** Courts are apt to make too narrow a view of the rights of cross-examination, confining it to the subject-matter of the examination in chief. Undoubtedly the cross-examination can not go beyond that matter, but it ought to be allowed a very free range within it. The witness may be sifted as to every fact touching the matters to which

<sup>102</sup> *Fuller v. Fuller*, 17 Cal. 605. A Chinaman, who believes in the Chinese religion, but takes the ordinary form of oath, without objection, and testifies that he regards it as binding, is, as far as concerns religious belief, a competent witness. *Territory v. Yee Shun*, 8 N. Mex. 82.

<sup>103</sup> *Baker v. Joseph*, 16 Cal. 173.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*; see *McDaniel v. Baca*, 2 Cal. 327; 56 Am. Dec. 339. Impeachment of witness by proof of contradictory statements. See *San Diego, etc., Co. v. Neale*, 88 Cal. 50; *Empire, etc., Co. v. Bonanza, etc., Co.*, 67 *id.* 406; *Krewson v. Purdom*, 13 Oreg. 563.

<sup>106</sup> *Fox v. Fox*, 25 Cal. 587.

<sup>107</sup> Cal. Code Civ. Pro., §§ 2049, 2052; see, also, *Patterson v. Keystone M. Co.*, 30 Cal. 380; *Norwood v. Kenfield*, *id.* 398; *People v. Chin Mook Sow*, 51 *id.* 597; *In re Kennedy*, 104 *id.* 429; *Tourtelotte v. Brown*, 4 Col. App. 377.

he testifies, so that his temper, leanings, relations to the parties and cause, his intelligence, the accuracy of his memory, his disposition to tell the truth, his character, his means of knowledge, his general and particular acquaintance with the subject-matter, may be fully tested.<sup>108</sup> The opposite party may cross-examine a witness as to any facts stated in his direct examination or connected therewith, and in so doing may put leading questions; but if he examine him as to other matters, such examination is to be subject to the same rules as a direct examination.<sup>109</sup>

§ 4681. **Discretion of court.** It is in the discretion of the court to allow or refuse the introduction of further testimony after resting;<sup>110</sup> or to allow a leading question to be put;<sup>111</sup> or

<sup>108</sup> Jackson v. Feather River & Gibsonville Water Co., 14 Cal. 18.

<sup>109</sup> Cal. Code Civ. Pro., § 2048; see, also, Harston's Practice, note to same section; People v. Chin Mook Sow, 51 Cal. 597; People v. Gallagher, 100 Cal. 466. The discretion of the trial court in allowing questions to be put upon cross-examination should not be impugned except for abuse. City of Santa Ana v. Harlin, 99 Cal. 538; and see, also, Barnhart v. Fulkerth, 93 id. 497; Sayres v. Allen, 25 Oreg. 211; Ah Doon v. Smith, 25 id. 89; Carroll v. Water Co., 5 Wash. St. 613; Tourtelotte v. Brown, 1 Col. App. 408; Tramway Co. v. Reid, 4 id. 53; Rosum v. Hodges, 1 S. Dak. 308; Holdridge v. Lee, 3 id. 134. Where the defendant offers himself as a witness in his own behalf, his cross-examination is subject to the same rules as that of any other witness. People v. Hite, 8 Utah, 461; and see Patrick v. Crowe, 15 Col. 543. A witness can not be cross-examined as to any fact which is collateral and irrelevant to the issue merely for the purpose of contradicting him by other evidence. Tourtelotte v. Brown, 4 Col. App. 377; People v. Jenkins, 56 Cal. 4. And where a witness has been exhaustively cross-examined upon a particular point, it is not an abuse of discretion for the court to excuse him from further cross-examination, in the absence of any suggestion from the counsel conducting the examination that he wished to cross-examine the witness upon other points. Sandell v. Sherman, 107 Cal. 391; and see Koch v. Investment Co., 20 Col. 405. Where the defendant's demurrer to a complaint for damages has been overruled, and he declines to plead further, but is permitted to cross-examine the plaintiff's witnesses on the question of damages, the refusal of the court to state the legal effect of the cross-examination is not reviewable error. Colorado, etc., Ry. Co. v. Trevarthen, 1 Col. App. 152.

<sup>110</sup> Meyer v. Goedel, 31 How. Pr. 456; see § 4685, *post*.

<sup>111</sup> Black v. Camden & Amboy R. R. Co., 45 Barb. 40; State v. Chee Gong, 17 Oreg. 635; Moran v. Abbey, 63 Cal. 56.

to grant an amendment at the trial.<sup>112</sup> The refusal of a court trying an issue without a jury to consider the testimony as conflicting, or to pass upon the credibility of witnesses, raises no questions reviewable.<sup>113</sup>

§ 4682. **Documentary evidence.** The exemplification of a decree of divorce must contain all the proceedings, and must show on its face that jurisdiction was acquired;<sup>114</sup> of a record of a will must contain the proofs before the surrogate.<sup>115</sup> The attestation of a foreign judgment must be signed by the clerk himself.<sup>116</sup> A certificate of exemplification of a judgment rendered in another state, when attested by the clerk under the seal of the court, and when the presiding judge of the court certifies to that attestation as in due form of law, is sufficient, under the act of Congress of May 26, 1790, to sustain an action upon the judgment in another state.<sup>117</sup>

§ 4683. **Impeachment of witness.** A witness may be impeached by the party against whom he is called, by contradictory evidence, or by evidence that his general reputation for truth, honesty, and integrity is bad, but not by evidence of particular wrongful acts, except that it may be shown by the examination of the witness, or the record of the judgment, that

<sup>112</sup> *Binnard v. Spring*, 42 Barb. 470. As to the order of admission of relevant testimony, see *Murphy v. Boker*, 28 How. Pr. 251. As to imposing restrictions on undue latitude of cross-examination, see *Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127; 88 Am. Dec. 311.

<sup>113</sup> *Terry v. Wheeler*, 25 N. Y. 520.

<sup>114</sup> *Lawrence's Case*, 18 Abb. Pr. 347.

<sup>115</sup> *Hill v. Crockford*, 24 N. Y. 128.

<sup>116</sup> *Morris v. Patchin*, 24 N. Y. 394; 82 Am. Dec. 311. As to authentication of a Canada judgment, see *Lazier v. Westcott*, 26 N. Y. 146; 82 Am. Dec. 404. Of a judgment of English Privy Council, see *Jarvis v. Sewall*, 40 Barb. 449. See as to admission of foreign charter *per se*, *Brooks Paper Works v. Willett*, 19 Abb. Pr. 416.

<sup>117</sup> *Thompson v. Manrow*, 1 Cal. 428; *Parke v. Williams*, 7 id. 249. Consult, also, Cal. Code Civ. Pro., §§ 1887 to 1951; *Eltzroth v. Ryan*, 89 Cal. 135; *Green v. Green*, 103 id. 108, 111. Where certain preliminary proof is necessary to the introduction of any kind of documentary evidence, the sufficiency of such proof is to be determined in the first instance by the trial judge, and his determination of the matter will not be disturbed unless there has been an abuse of discretion. *Webster v. Lumber Co.*, 101 Cal. 326; *Bryce v. Joynt*, 63 id. 378.

he had been convicted of a felony. But conviction of a felony must be proved by the record; parol evidence of the fact is inadmissible.<sup>118</sup> A witness who is called to impeach another may answer that he would not believe such other witness on oath. This is the uniform practice in California.<sup>119</sup> Evidence of bad character for chastity is not admissible for the purpose of impeaching the testimony of a witness. It must be restricted to her character for truth and veracity.<sup>120</sup>

**§ 4684. Party not bound by statements.** A party is not bound by, or held to admit as true, statements made by his witnesses during the trial, because he does not deny or contradict them at the time.<sup>121</sup> If a party offers a witness to prove the sale of a mining claim, under which he claims, and the witness says the sale was in writing, the party is bound by the statement of the witness, and must produce the writing or account

<sup>118</sup> *People v. Schenick*, 65 Cal. 625; Cal. Code Civ. Pro., § 2051; see *Id.*, § 2052; *People v. Reinhart*, 39 Cal. 449; *Newcomb v. Griswold*, 24 N. Y. 298; *People v. Murray*, 41 Cal. 67; *People v. Ah Who*, 49 *id.* 32; *People v. Parton*, *id.* 632.

<sup>119</sup> *Stevens v. Irwin*, 12 Cal. 306; see, also, *People v. Tyler*, 35 *id.* 553.

<sup>120</sup> *People v. Yslas*, 27 Cal. 630. *Curry, J.*, holds that it should not be confined to her character for truth and veracity, but should extend to her entire moral character; and she may be impeached by testimony showing that her general moral character is bad. *Id.* *Impeachment of witnesses.*— See § 4679, *ante*. Consult, also, the following cases: *Jones v. Duchow*, 87 Cal. 109; *Evans v. De Lay*, 81 *id.* 103; *Barkly v. Copeland*, 86 *id.* 483; *Sharon v. Sharon*, 79 *id.* 633; *Davies v. Steamship Co.*, 80 *id.* 280; *Redington v. Cable Co.*, 107 *id.* 317; *State v. Manville*, 8 Wash. St. 523; *Wimer v. Smith*, 22 Oreg. 469; *State v. Hunsaker*, 16 *id.* 499; *Steeple v. Newton*, 7 *id.* 110; 33 Am. Rep. 705. Laying foundation. See *United States v. Fuller*, 4 N. Mex. 358; *Young v. Brady*, 94 Cal. 128; *Clavey v. Lord*, 87 *id.* 413; *Krewson v. Purdom*, 13 Oreg. 563; *Sheppard v. Yocum*, 10 *id.* 402. Impeachment by use of stenographer's notes. See *Klepsch v. Donald*, 8 Wash. St. 162. A sound discretion will never sanction inquiries the sole object of which is to disgrace the witness, and not to test his credibility. *State v. Bacon*, 13 Oreg. 143. A witness, whichever party calls him, can not be impeached unless he has given testimony against the impeaching party. *People v. Mitchell*, 94 Cal. 550; and see *Langford v. Jones*, 18 Oreg. 307, 326. And a witness can not be impeached by evidence showing him to be a person without religious belief. *People v. Copsey*, 71 Cal. 548.

<sup>121</sup> *Wilkins v. Stidger*, 22 Cal. 231; 83 Am. Dec. 64.

for its loss.<sup>122</sup> A party calling a witness is not precluded from proving, by another witness, the truth of any particular fact in direct contradiction to what the first witness may have testified.<sup>123</sup>

**§ 4685. Recalling witness.** If the ends of justice require, it is both the right and duty of a court to permit a witness to be recalled after a party has closed his case.<sup>124</sup>

**§ 4685a. Order of proof.** As a general rule, the mere order in which evidence may be introduced is very much in the discretion of the court, and will not be interfered with by the appellate court, except in cases of abuse of discretion.<sup>125</sup> Even the application of the rule that a defendant should not open the defense by a cross-examination of the plaintiff's witnesses, must rest largely in the sound discretion of the trial court.<sup>126</sup> In the trial of an adverse mining suit, it is not error for the court to decline to direct counsel for the defendant as to the order in which he should produce certain of his proofs.<sup>127</sup>

**§ 4685b. Limiting number of witnesses.** The court may, in its discretion, limit the number of expert witnesses that may be called upon the trial.<sup>128</sup> And it was held to be within the

<sup>122</sup> *Patterson v. Keystone Mining Co.*, 30 Cal. 360.

<sup>123</sup> *Norwood v. Kenfield*, 30 Cal. 393.

<sup>124</sup> *Fairchild v. California Stage Co.*, 13 Cal. 599; *People v. Keith*, 50 *id.* 139; Cal. Code Civ. Pro., § 2050. The question is one left to the sound discretion of the court, and its action will not be disturbed unless a clear abuse of discretion is shown. *Rea v. Wood*, 105 Cal. 314; *Briswalter v. Palomares*, 66 *id.* 259; *McGrath v. Wallace*, 85 *id.* 622. The refusal of the court to permit the recalling of a witness, after the evidence was closed, to contradict a statement drawn from another witness on cross-examination, is not erroneous. *Layton v. Kirkendall*, 20 Col. 236. It is within the discretion of the court to permit further evidence, when it sets aside the verdict in an equity case. *Clavey v. Lord*, 87 Cal. 413. Evidence in rebuttal, discretion of court as to introduction of. *Charles v. Varian*, 4 Col. App. 227. Redirect examination of witness, scope of. *Robinson v. Peru Plow & Wheel Co.*, 1 Okl. 140.

<sup>125</sup> *Bates v. Tower*, 103 Cal. 404; *Lee Silver Min. Co. v. Englebach*, 18 Col. 106; *Hutchins v. Kimmell*, 31 Mich. 126; *Bowman v. Eppinger*, 1 N. Dak. 121.

<sup>126</sup> *Hopkins v. Railway Co.*, 2 Idaho, 277; but compare *Haines v. Snedigar*, 110 Cal. 18.

<sup>127</sup> *Bushnell v. Smelting Co.*, 12 Col. 247.

<sup>128</sup> *Huett v. Clark*, 4 Col. App. 231.



discretion of the trial court, in the particular case, to limit the respective parties in the number of witnesses as to any particular point to three upon a side.<sup>129</sup>

§ 4685c. **Refreshing memory of witness.** A witness is allowed to refresh his memory respecting a fact by anything written by himself or under his direction at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory and he knew that the same was correctly stated in the writing.<sup>130</sup> It is accordingly held, that a bank depositor, testifying to the balance of account as a witness, may refresh his memory from the pass-book as to deposits made and amounts drawn out, where it appears that the entries of deposits were made in the presence of the witness and under his direction, and that the entries of the amount drawn out were made under his direction, and that he knew at the time that the balance stated was correct.<sup>131</sup>

§ 4686. **Argument of counsel.** Upon the close of the evidence, counsel for plaintiff opens the argument to the jury. Defendant replies, and plaintiff's counsel closes. If several defendants, having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument.<sup>132</sup> The court may then charge the jury.<sup>133</sup> The party who holds the affirmative and calls the first witness has the right to make the closing address.<sup>134</sup> On argument on demurrer to one separate defense, another can not be referred to to sustain it.<sup>135</sup> The opening of the cause, introduction of evidence, and summing up by counsel to the jury, or submit-

<sup>129</sup> Skeen v. Mooney, 8 Utah, 157.

<sup>130</sup> Cal. Code Civ. Pro., § 2047; and see Burbank v. Dennis, 101 Cal. 90; Price v. Garland, 3 N. Mex. 285, 290.

<sup>131</sup> McGowan v. McDonald, 111 Cal. 57. A witness may refresh his memory by reference to *memoranda* of the dates, weights and prices entered by himself at the time certain sales were made. Rorig v. Pearson, 15 Col. 127. *Memoranda* not falling within the rule above stated. See Bergman v. Shoudy, 9 Wash. St. 331; Loan Assoc. v. Hart, 2 Col. 594.

<sup>132</sup> Cal. Code Civ. Pro., § 607, subd. 5.

<sup>133</sup> Id., subd. 6.

<sup>134</sup> Elwell v. Chamberlin, 31 N. Y. 611. As to allowing the right to close to either party, see Fry v. Bennett, 28 N. Y. 324.

<sup>135</sup> Jackson v. Van Slyke, 44 Barb. 116; and see Fairbanks v. Irwin, 15 Col. 366; Lynch v. Richter, 10 Wash. St. 486.



ting of the cause to the court or referee, on written points and arguments, after the evidence is closed, are parts of the trial of an issue of fact, and the trial is not completed until the cause is finally submitted to the court, referee, or jury.<sup>136</sup>

Counsel have a right to discuss the case in all its bearings, and so long as they do not go outside of it and attempt to bring in other matters, they can not be restrained by the court.<sup>137</sup> Subject to the general rule that counsel may not comment upon matters of fact that are not in evidence, trial courts should, in the exercise of a reasonable discretion, favor the freest and fullest discussion.<sup>138</sup> It is improper upon the trial before the jury for counsel to refer to or in any manner animadvert upon the plaintiff's refusal to consent that her physician be examined. It is a privilege secured by law, and is not to be questioned.<sup>139</sup> An argument which refers to the trial judge in language that is wholly unnecessary and grossly improper, will not be allowed.<sup>140</sup> The trial court has power, in its discretion, to limit the argument of counsel, and its action in this respect is not the subject-matter of review, unless, possibly, in case of very evident and plain abuse of such discretion.<sup>141</sup> The consequences resulting from absences of the trial judge during the argument of a cause to the jury, may be such as to necessitate the granting of a new trial.<sup>142</sup>

<sup>136</sup> *Mygatt v. Wilcox*, 35 How. Pr. 410.

<sup>137</sup> *Knight v. Russ*, 77 Cal. 410.

<sup>138</sup> *Cook v. Doud*, 14 Col. 483; also, to same effect, *Felt v. Cleg-horn*, 2 Col. App. 4; *Hill v. National Bank*, id. 325.

<sup>139</sup> *Kelley v. Highfield*, 15 Oreg. 277.

<sup>140</sup> *Diamond, etc., Min. Co. v. Faulkner*, 17 Col. 9; *Brownell v. McCormick*, 7 Mont. 13; *Green v. Elbert*, 137 U. S. 615. Reading extracts from law books to the jury, when permitted. *Gilberson v. Smelting Co.*, 4 Utah, 46; *Sullivan v. Royer*, 72 Cal. 248. Where counsel makes an improper argument to the jury during the temporary absence of the judge from his seat, but the judge after his return, upon the objection of the opposing counsel, compels him to desist therefrom, and subsequently instructs the jury to disregard such argument, no error can be founded thereon. *Graves v. Smith*, 7 Wash. St. 14; and see *Skagit, etc., Lumber Co. v. Cole*, 2 Wash. St. 57.

<sup>141</sup> *Groth v. Kersting*, 4 Col. App. 395; and see *Skeen v. Mooney*, 8 Utah, 157. Construction of statute limiting time for argument of counsel. See *Hurst v. Burnside*, 12 Oreg. 520.

<sup>142</sup> *Rose v. Otis*, 18 Col. 59.

§ 4687. **Instructions to jury.** In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, and if it state the testimony of the case, it must inform the jury that they are exclusive judges of all questions of fact. The court must furnish to either party, at the time, upon request, a statement in writing of the points of law contained in the charge, or sign, at the time, a statement of such points prepared and submitted by the counsel of either party.<sup>143</sup> The instruction by the court should be a complete charge upon the legal questions to which it relates.<sup>144</sup> If the court charge the jury erroneously upon a proposition of law, which does not arise in the case, either upon the pleadings or the evidence, and which could not affect the result, the error is not material, and will not cause a reversal of the judgment.<sup>145</sup>

A judge is bound to instruct a jury upon each proposition of law submitted to him by counsel bearing upon the evi-

<sup>143</sup> Cal. Code Civ. Pro., § 608. Ordinarily, an extended charge to the jury is unnecessary. But when the question to be determined by the jury is complicated, and dependent upon a variety of circumstances and conditions, it is important that the jury should be guided in their deliberations by the learning and experience of the presiding judge. *Sutton v. Dana*, 15 Col. 98.

<sup>144</sup> *Bradley v. Lee*, 38 Cal. 362. Comment on the facts by the judge during the progress of a jury trial is harmless error, when not prejudicial to the party complaining. *Earles v. Bigelow*, 7 Wash. St. 581.

<sup>145</sup> *Satterlee v. Bliss*, 36 Cal. 489. Generally speaking, an erroneous instruction, which the record shows could cause no injury to the complaining party, is not ground for reversal. *Los Angeles, etc., Assoc. v. Los Angeles*, 103 Cal. 461; *National Bank v. Lempe*, 3 N. Dak. 154; and see, also, *Witherby v. Thomas*, 55 id. 9; *Winans v. Lumber Co.*, 66 id. 61; *Hughes v. Wheeler*, 76 id. 230; *Carroll v. Water Co.*, 5 Wash. St. 613; *Hoagland v. Cole*, 18 Col. 426; *Patrick, etc., Co. v. Skoman*, 1 Col. App. 323; *McClellan v. Hurdle*, 3 id. 430; *Denver, etc., R. R. Co. v. Ryan*, 17 Col. 98; *Simonton v. Rohm*, 14 id. 51; *Faut v. Lyman*, 9 Mont. 61. A mere misuse of the conjunctive "and" instead of the disjunctive "or" in a charge which has clearly and repeatedly correctly stated the law is harmless error, which will not warrant a reversal. *O'Connor v. Langdon*, 2 Idaho, 803. Neither the refusal of an unnecessary instruction, nor the giving of one not in prejudice of the interest of the complaining party, will sustain an assignment of error. *Pinkerton v. Ledoux*, 3 N. Mex. 252; and see *Territory v. Baker*, 4 id. 117. For instructions which are to be given on all proper occasions, see Cal. Code Civ. Pro., § 2061.

dence.<sup>146</sup> But he is not bound, without the request of parties, to instruct the jury; and the latter are presumed to be acquainted with all the rules of law in regard to which the parties do not require them to be instructed, or the court does not instruct them.<sup>147</sup> Where either party asks special instructions to be given to the jury, the court must either give such instruction, as requested, or refuse to do so, or give the instruction with a modification, in such manner that it may distinctly appear what instructions were given in whole or in part.<sup>148</sup> If either party deem any instruction appropriate, he must offer it.<sup>149</sup> Proposed instructions should be read in the hearing of the jury before they are passed upon by the court.<sup>150</sup> Upon refusal to give instructions, the court should state its reasons, or it is error.<sup>151</sup> Whenever the knowledge of the court is by this Code made evidence of a fact, the court is to declare such knowledge to the jury, who are bound to accept it.<sup>152</sup> If an equity case is treated as an ordinary action at law, and submitted to a jury as such, and the court considered itself bound and controlled by the verdict as in an action of law, each party has the same right with respect to instruction as if it were a case at law.<sup>153</sup> The court should give or refuse instructions as asked for, and though the phraseology may be modified to make it more intelligible, yet the sense must not be altered.<sup>154</sup> But where an instruction asked by defendant, if given entire, would have been erroneous, the court is not bound to separate the concluding clause, and give that by itself, and may, therefore, refuse to give the instruction.<sup>155</sup> A correct charge by the court

<sup>146</sup> *Zabriskie v. Smith*, 13 N. Y. 322; 64 Am. Dec. 551; see *Williams v. Williams*, 20 Cal. 51, 69; *Hislop v. Moldenhauer*, 23 Oreg. 119.

<sup>147</sup> *Haupt v. Pohlman*, 16 Abb. Pr. 301; *Marine Bank of N. Y. v. Clements*, 31 N. Y. 33; *Wilklow v. Lane*, 37 Barb. 244.

<sup>148</sup> Cal. Code Civ. Pro., § 609.

<sup>149</sup> *People v. Ah Wee*, 48 Cal. 239.

<sup>150</sup> *Waldie v. Doll*, 29 Cal. 561.

<sup>151</sup> *People v. Hurley*, 8 Cal. 391; *People v. Ramirez*, 13 id. 173; *People v. Williams*, 17 id. 148.

<sup>152</sup> Cal. Code Civ. Pro., § 2102.

<sup>153</sup> *Van Vleet v. Olin*, 4 Nev. 95; 97 Am. Dec. 513.

<sup>154</sup> *Conrad v. Lindley*, 2 Cal. 174; *Jamson v. Quivey*, 5 id. 491; *Russell v. Amador*, 3 id. 403; *People v. Davis*, 47 id. 93; *First Baptist Church in Brooklyn v. Brooklyn Fire Ins. Co.*, 23 How. Pr. 448.

<sup>155</sup> *Smith v. Richmond*, 19 Cal. 477; *Mayor of N. Y. v. Exchange Fire Ins. Co.*, 9 Bosw. 424; *People v. Davis*, 1 West Coast Rep. 341; *People v. Biddlecome*, id. 691.

upon a matter in issue cures a refusal by the court to give a correct charge upon the same point asked by one of the other parties.<sup>156</sup> A rule of court requiring counsel to file and submit to the court any instructions they may offer, before the argument is closed to the jury, does not operate where the cause is submitted without argument.<sup>157</sup> If there is a rule requiring instructions to be handed to the judge by a certain time in the progress of the trial, it is not error for the court to refuse instructions not handed in in time.<sup>158</sup>

§ 4688. *Instructions, how given.* Instructions in civil and criminal cases should be drawn with reference to the case, as made by the evidence.<sup>159</sup> An instruction of the court to the jury must be adapted to the facts of the case.<sup>160</sup> Instructions to a jury, asked by a party, which are not pertinent to any issue in the cause, should be refused, even though they embody correct abstract principles of law.<sup>161</sup> No instructions should be given to a jury which are not predicated upon some theory logically deducible from at least some portion of the testimony.<sup>162</sup> Where the answer was insufficient as a denial of the allegations in the complaint, and the court instructed the jury to find for plaintiff, it was held that the instruction was right, no evidence being required on the part of plaintiff.<sup>163</sup> When certain allegations of fact in the complaint are admitted in the answer, an instruction by the court to the jury that the admitted facts will be taken by them as true, and that they will so find for plaintiff, is not an instruction to the jury to find a verdict in favor of the plaintiff, except as to the facts so admitted.<sup>164</sup> It is not error for the judge, in stating the testimony of the jury, to read a memorandum of testimony taken by another person, instead of using his

<sup>156</sup> *Davis v. Perley*, 30 Cal. 630; see *Manning v. Dallas*, 73 id. 420; *Sappenfield v. Railroad Co.*, 91 id. 48.

<sup>157</sup> *Tinney v. Endicott*, 5 Cal. 102.

<sup>158</sup> *Waldie v. Doll*, 29 Cal. 558.

<sup>159</sup> *People v. Roberts*, 6 Cal. 217.

<sup>160</sup> *People v. Honshell*, 10 Cal. 87; *People v. Byrnes*, 30 id. 206; *Thompson v. Lee*, 8 id. 275; *People v. Hurley*, 30 id. 390.

<sup>161</sup> *Conlin v. S. F. & S. J. R. R. Co.*, 36 Cal. 404; *People v. Byrnes*, 30 id. 206; *Capuro v. Builders' Ins. Co.*, 39 id. 123; *People v. Turley*, 50 id. 469.

<sup>162</sup> *People v. Sanchez*, 24 Cal. 28; and see *Hunt v. Elliott*, 77 id. 588; *Reuton v. Monnier*, id. 449.

<sup>163</sup> *Kuhland v. Sedgwick*, 17 Cal. 123.

<sup>164</sup> *Blood v. Light*, 31 Cal. 115.

own minutes or making the statement from recollection.<sup>165</sup> In stating the testimony, the safer course is to recite the language of the witness, but if the substance only is stated correctly, it is not error.<sup>166</sup> Whether an instruction giving the general rule without qualification be proper or not depends on the facts in proof, and the charge would be right or wrong according to the circumstances of the given case.<sup>167</sup>

**§ 4688a. Form and sufficiency of instructions — generally.** The trial court may exercise a sound discretion as to the form and style in which instructions shall be given to the jury. It may either give instructions in the form submitted by counsel, or may consider such requests as expressing the views of the respective parties, and use them in preparing a connected and harmonious charge to the jury, the latter being the preferable practice.<sup>168</sup> It is, however, held, that when counsel propose a proper charge, if given at all by the court, it ought to be given to the jury in the form submitted.<sup>169</sup> Voluminous instructions, in ordinary cases, are condemned as bad practice, especially where a few plain and simple propositions of law applicable to the facts will suffice.<sup>170</sup> If instructions, in general terms, state the law correctly, but a party desires more specific instructions, he should ask the court to instruct the jury specifically upon the point.<sup>171</sup> Instructions are required to state only so much of the law as may be applicable and essential to the issues and facts of the case on trial. To this extent the charge must be correct and explicit, but if unexceptionable in these essentials it will not be ground of reversal that the instructions are not strictly correct as universal propositions of law.<sup>172</sup> And inaccuracy of an instruction in stating the grounds of a rule of

<sup>165</sup> *People v. Boggs*, 20 Cal. 432.

<sup>166</sup> *People v. Doyell*, 48 Cal. 91; see, also, on this subject, *People v. Dick*, 34 id. 663; *Pico v. Stevens*, 18 id. 377.

<sup>167</sup> *People v. Arnold*, 15 Cal. 482.

<sup>168</sup> *Morrison v. McAtee*, 23 Oreg. 530; *Knothla v. Railway Co.*, 21 id. 137; *Conlon v. Railway Co.*, 23 id. 499; and see *Reddon v. Railway Co.*, 5 Utah, 344; *People v. Chadwick*, 7 id. 134.

<sup>169</sup> *Gottstein v. Lumber Co.*, 7 Wash. St. 424.

<sup>170</sup> *Weekland v. South. Oreg. Co.*, 20 Oreg. 591; *Anderson v. Lumber Co.*, 21 id. 288; and see *Marsh v. Cramer*, 16 Col. 331; *Sutton v. Dana*, 15 id. 98; *Improvement Co. v. Stead*, 95 U. S. 166.

<sup>171</sup> *Griffiths v. Clift*, 4 Utah, 462; *Rice v. Whitmore*, 74 Cal. 610.

<sup>172</sup> *Denver, etc., R. R. Co. v. Conway*, 8 Col. 1; *Curr v. Handley*, 3 Col. App. 54.

law is harmless, if it state the rule correctly in its substance.<sup>173</sup> An instruction should not be given upon a point not in dispute.<sup>174</sup> It should not direct the attention of the jury to a fact not in issue, and make the findings on that fact decisive against one of the parties.<sup>175</sup> The court is not bound to instruct upon phrases of law or an hypothesis not involved in the case.<sup>176</sup> An instruction upon an assumed fact, as to which there is no evidence, is erroneous;<sup>177</sup> and so where there is a substantial conflict in the evidence.<sup>178</sup> Instructions should not be too general, nor should they be given in the abstract. And it is held that abstract propositions of law, not applicable to the facts of the case in hand, are misleading and mischievous, and to present such in an instruction to a jury is reversible error.<sup>179</sup> But when correct abstract propositions of law are given, and the instructions, considered together, advise the jury clearly and in the concrete, the abstract propositions do not necessarily vitiate the charge.<sup>180</sup> It is error to give to the jury inconsistent and contradictory instructions, and where instructions on a material point are contradictory the judgment will be reversed.<sup>181</sup> But unless a party is prejudiced or the jury is misled by apparently conflicting instructions there is no ground for re-

<sup>173</sup> *Hill v. Finigan*, 77 Cal. 267.

<sup>174</sup> *De Baker v. Railway Co.*, 106 Cal. 257.

<sup>175</sup> *Marx v. Schwartz*, 14 Oreg. 177.

<sup>176</sup> *Stevens v. Railroad Co.*, 100 Cal. 554; *Shattuck v. Smith*, 5 Oreg. 125.

<sup>177</sup> *Glenn v. Savage*, 14 Oreg. 567; *Bowen v. Clarke*, 22 *Id.* 568; 29 *Am. St. Rep.* 626; *Patrick v. Skoman*, 1 *Col. App.* 323; and see *Frost v. Lumber Co.*, 3 *Wash. St.* 241; *Kelley v. Cable Co.*, 7 *Mont.* 70; *Meyer v. Black*, 4 *N. Mex.* 190; *Chicago, etc., Railway Co. v. Ferguson*, 3 *Col. App.* 414.

<sup>178</sup> *Llewellyn Steam, etc., Co. v. Malter*, 76 Cal. 242.

<sup>179</sup> *Pearson v. Dryden*, 28 Oreg. 350; *Coos Bay R. R. Co. v. Siglin*, 26 *Id.* 393; *Hislop v. Moldenhauer*, 23 *Id.* 119; *Bowen v. Clarke*, 22 *Id.* 566; 29 *Am. St. Rep.* 625; compare *Comptoir, etc., v. Dresbach*, 78 Cal. 15; *Marriner v. Dennison*, 78 *Id.* 202; *People v. Devine*, 95 *Id.* 227; *Deep Mining Co. v. Fitzgerald*, 21 *Col.* 533; *Johnson v. Fraser*, 2 *Idaho*, 371.

<sup>180</sup> *Denver Tramway Co. v. Owens*, 20 *Col.* 107. Instructions assuming the existence of facts not controverted are proper. *Hogan v. Shuart*, 11 *Mont.* 498; and see *People v. Phillips*, 70 Cal. 61.

<sup>181</sup> *Haight v. Vallet*, 89 Cal. 245; and see *Harrison v. Water Co.*, 65 *Id.* 376; *Sappenfield v. Railroad Co.*, 91 *Id.* 48; *Morrison v. McAttee*, 23 Oreg. 530; *Davis v. Railroad Co.*, 53 *Ark.* 117; *Lufkins v. Collins*, 2 *Idaho*, 135; *Vallens v. Tillman*, 103 Cal. 187.

versal.<sup>182</sup> An instruction should contain a principle of law applicable to the case, expressed in plain language indicating no opinion of the court as to any fact in the case, and if it be argumentative in its character, it is properly refused.<sup>183</sup> An instruction should be free from ambiguity, and it is error to give misleading instructions.<sup>184</sup> But the giving of incomplete and ambiguous instructions is not error, unless the court has been requested to make its instructions more full and complete, and has refused.<sup>185</sup> The misuse of the word "testimony," instead of the word "evidence," in an instruction upon the subject of the preponderance of evidence, is not such an error as would probably mislead the jury.<sup>186</sup> It is not error for the trial court, in charging the jury, to quote from decisions of courts in other cases, if the quotations correctly state the law.<sup>187</sup> But trial courts should not instruct juries by reading to them an opinion of another court. If they desire to adopt such an opinion as the law of the case, they should copy from it and deliver the portions applicable.<sup>188</sup> Where the statute requires instructions to be given in writing, the oral charge taken down by the stenographer, extended by him, and, as so extended, handed to the jury upon their retirement, does not constitute a compliance with the statute.<sup>189</sup> But where a party sits by and hears the trial judge give the jury parol instructions, and fails to object thereto at the time and upon that ground, he is conclusively presumed to have waived the error.<sup>190</sup> And when there is nothing in the record and no evidence *aliunde* to show that the court instructed the jury orally instead of in writing, as required by

<sup>182</sup> *Witherby v. Thomas*, 55 Cal. 9; and see *Kelley v. Cable Co.*, 7 Mont. 70.

<sup>183</sup> *Morris v. Lachman*, 68 Cal. 109; *People v. McNamara*, 94 id. 509.

<sup>184</sup> *Boucher v. Mulverhill*, 1 Mont. 306; *Huntoon v. Lloyd*, 7 id. 365.

<sup>185</sup> *Box v. Kelso*, 5 Wash. St. 360; *McQuillan v. Seattle*, 13 id. 600.

<sup>186</sup> *Mann v. Higgins*, 83 Cal. 66; and see *O'Callaghan v. Bode*, 84 id. 489.

<sup>187</sup> *Estate of Spencer*, 96 Cal. 448.

<sup>188</sup> *Stewart v. Hunter*, 16 Oreg. 62; 8 Am. St. Rep. 267; and see *Cousins v. Partridge*, 79 Cal. 224; *People v. McNabb*, id. 419. Reading section of Code to jury. See *People v. Burns*, 63 Cal. 614; Reading extracts from pleadings to jury. See *Cook v. Merritt*, 15 Col. 212.

<sup>189</sup> *Brown v. Crawford*, 2 Col. App. 235; affirmed, 21 Col. 272; and see *Rich v. Lappin*, 43 Kan. 666.

<sup>190</sup> *Boss v. Railroad Co.*, 2 N. Dak. 128.



the statute, the presumption is in favor of the court's observance of the law.<sup>191</sup> The object in requiring prayers for instructions to be numbered and signed is not for the information or guidance of the jury, but for the convenience of the court and the protection of the parties litigant in the matter of preserving their objections and exceptions. And if a party omits this requirement, or suffers the opposing party to do so without objecting in apt time, he will not be heard afterwards to complain of the omission.<sup>192</sup>

§ 4688b. **Misleading and erroneous instructions.** Where a person is in possession of a stock of goods, not only as mortgagee, but as vendee, an instruction as to the fraudulent character of the mortgage, ignoring the sale, is misleading.<sup>193</sup> An instruction, virtually assuming the testimony of a party to a material fact to be true, charges the jury with respect to a matter of fact, and is erroneous.<sup>194</sup> The giving of instructions at variance with the evidence, or not warranted by it, is clearly erroneous.<sup>195</sup> In no case would it be proper to instruct the jury that if there is some evidence in favor of the plaintiff's side of the case,

<sup>191</sup> *Kent v. Favor*, 3 N. Mex. 218. The statute providing that modifications of instructions asked must not be by interlineation or erasure is merely directory, and an erasure not prejudicial to the party objecting thereto is not ground for reversal. *Denver, etc., Railroad Co. v. Harris*, 3 N. Mex. 100. In Montana, it is error for a judge of the District Court to give oral instructions. *Marden v. Wheelock*, 1 Mont. 49. The practice of orally requesting the court to charge propositions of law disapproved in Utah. Counsel should be required to conform to the statutes, and present their instructions in writing. *People v. Miller*, 4 Utah, 410.

<sup>192</sup> *Moffatt v. Tenney*, 17 Col. 189; and see *Wray v. Carpenter*, 16 id. 271; *Railroad Co. v. Ryan*, 17 id. 98. The statute of New Mexico (Comp. Laws, § 2059), requiring the court to number its instructions is merely directory, and failure to comply with its provisions will not justify a reversal, it appearing that no rights of the parties were affected thereby. *Miller v. Preston*, 4 N. Mex. 314.

<sup>193</sup> *Chandler v. Colcord*, 1 Okl. 260. Misleading instruction as to amount of recovery in action on special contract. See *Mattingly v. Roach*, 84 Cal. 210; *Edison, etc., Co. v. Navigation Co.*, 8 Wash. St. 370. Misleading instruction on question of rescission of contract. *Gottstein v. Seattle Lumber, etc., Co.*, 7 Wash. St. 424.

<sup>194</sup> *Vnllicevich v. Skinner*, 77 Cal. 239; and see *Elderkin v. Peterson*, 8 Wash. St. 674; *Glenn v. Savage*, 14 Oreg. 567.

<sup>195</sup> *Innis v. Carpenter*, 4 Col. App. 30; and see *People v. Mauritzen*, 84 Cal. 37; *Allen v. Railroad Co.*, 7 Utah, 239.



whether it be little or great, it is their duty to find for the plaintiff.<sup>196</sup> In an action to recover upon an express contract for the sale of logs, an instruction that if defendant had converted the logs to its own use it would be liable for their value, is erroneous.<sup>197</sup> Under the Oregon statute, it is error for the court to charge the jury as to the effect and value of certain of the evidence given at the trial.<sup>198</sup> The court has no right to direct as to the credence the jury shall give to any evidence submitted to them.<sup>199</sup> An instruction good in itself but inapplicable to the issue being tried should not be given, as its tendency is to confuse the jury.<sup>200</sup> In an action for damages for personal injuries, instructions should be clear and definite as to facts, the existence of which would create a liability.<sup>201</sup> Instructions invading province of jury are erroneous.<sup>202</sup> So of instructions given on different theories.<sup>203</sup> An instruction to a jury in a civil case, charging that they "should be satisfied by a clear preponderance of proof" before they can find certain facts is not misleading, when the court has first charged the jury that "it is not required in a civil action to establish the facts beyond a reasonable doubt as in a criminal case, but a fair preponderance of proofs is all that is required."<sup>204</sup> And failure to fully instruct a jury is not ground of complaint for a party who offers and is granted defective instructions.<sup>205</sup> An instruction that there was no evidence contradicting the testimony of the defendant as to a certain fact was held proper.<sup>206</sup> An instruction which might have a broader meaning than was properly intended, but which did not in fact mislead the jury, is harmless to the appellant.<sup>207</sup> So, in general terms, instructions are unobjectionable when they are sufficiently full, and, considered all

<sup>196</sup> *Bunting v. Saltz*, 84 Cal. 168.

<sup>197</sup> *Comegys v. American Lumber Co.*, 8 Wash. St. 661.

<sup>198</sup> *Meyer v. Thompson*, 16 Oreg. 194; and see *Moorhouse v. Donaca*, 14 id. 431.

<sup>199</sup> *State v. Huffman*, 16 Oreg. 15. Erroneous instructions in an action by a female for her own seduction. See *Breon v. Henkle*, 14 Oreg. 494.

<sup>200</sup> *Haraszthy v. Shandel*, 1 Col. App. 137.

<sup>201</sup> *Denver, etc., Translt Co. v. Dwyer*, 3 Col. App. 408.

<sup>202</sup> *Hannaker v. Railroad Co.*, 5 Dak. 1.

<sup>203</sup> *Kelley v. Cable Co.*, 7 Mont. 70.

<sup>204</sup> *Hart v. Fire Ins. Co.*, 9 Wash. St. 620.

<sup>205</sup> *Kelley v. Cable Co.*, 7 Mont. 70.

<sup>206</sup> *Moe v. Job*, 1 N. Dak. 140.

<sup>207</sup> *In re Burrell*, 77 Cal. 479.

together, state the law of the case clearly and correctly, and not unfairly to the appellant.<sup>208</sup>

§ 4689. **Instructions refused.** Instructions are properly refused when not warranted by the pleadings.<sup>209</sup> If facts are admitted in the pleadings, the jury should be so instructed.<sup>210</sup> To instruct the jury upon mere abstract questions of law, irrelevant to the case, serves only to bewilder and mislead them from the true issue to be determined.<sup>211</sup> Where a party asks an abstract proposition of law, by way of instruction to a jury, he takes the risk of its being correct in all its parts.<sup>212</sup> And a court may refuse an instruction asked, when the same has already been given in substance.<sup>213</sup> If the court has already given the law correctly to the jury upon a given point, it is not error to refuse a second instruction upon the same point.<sup>214</sup> Where equivalent instructions are asked and refused, the court should place its refusal on the ground that equivalent instructions

<sup>208</sup> *Murray v. White*, 82 Cal. 479.

<sup>209</sup> *Thompson v. Lee*, 8 Cal. 276. It is not error to refuse instructions which are not appropriate to the issue as tendered and accepted. *De Votie v. McGerr*, 15 Col. 467. And a correct instruction upon a matter with respect to which the pleadings are silent, and upon which no issue is presented by them, is properly refused. *Marriner v. Dennison*, 78 Cal. 202; and see *Johnson v. Fraser*, 2 Idaho, 371; *Johnson v. Jones*, 16 Col. 138.

<sup>210</sup> *Tevls v. Hicks*, 41 Cal. 123.

<sup>211</sup> *Gowler v. Smith*, 2 Cal. 39; *Benham v. Schaeffer*, id. 387; 56 Am. Dec. 342; *Branger v. Chevallier*, 9 Cal. 353; *Fairchild v. Cal. Stage Co.*, 13 id. 599; and see § 4688a, *ante*.

<sup>212</sup> *Thompson v. Paige*, 16 Cal. 77.

<sup>213</sup> *People v. King*, 27 Cal. 509; 87 Am. Dec. 95; *Fairchild v. Cal. Stage Co.*, 13 Cal. 599; *Belden v. Henriques*, 8 id. 87.

<sup>214</sup> *People v. Williams*, 32 Cal. 280; *People v. Lee Hung*, 1 West Coast Rep. 45; *Martin v. Hill*, id. 629; *Territory v. Kinney*, id. 801; *Seattle v. Busby*, 2 id. 45. The decisions in support of this rule are very numerous. See *Hayward v. Rogers*, 62 Cal. 348; *Sharp v. Blankenship*, 79 id. 411; *Bartlett v. San Francisco*, 63 id. 156; *Johnson v. Jones*, 16 Col. 138; *McKee v. Mining Co.*, 8 id. 392; *Farmer v. Phelps*, 18 id. 126; *Anderson v. Lumber Co.*, 21 Oreg. 281; *Sharp v. Blankenship*, 79 Cal. 411; *Bullard v. Stone*, 67 id. 477; *Dufour v. Railroad Co.*, id. 319; *Richards v. Insurance Co.*, 89 id. 170; *De Noon v. Morrison*, 83 id. 163; *Nichol v. Lanmeister*, 102 id. 658; *Haas v. Whittier*, 97 id. 411. The court is not bound to repeat itself at the request of counsel. *Stevens v. Railroad Co.*, 100 Cal. 554; *Gaynor v. Clements*, 16 Col. 209; *Cunningham v. Railway Co.*, 4 Utah, 206.

were given. Unless this is done, the jury may be misled.<sup>215</sup> A court may refuse to give to the jury an instruction which embraces a question which came properly before the court, and not before the jury.<sup>216</sup> It is not error for the court to refuse to instruct a jury "that where two innocent parties must suffer, that party who had been the cause of another's loss must lose."<sup>217</sup> The court can not be called upon to charge upon an assumed state of facts not proved upon the trial.<sup>218</sup> The court has no right to charge the jury in regard to conclusions of facts,<sup>219</sup> as it is the province of the jury, unaided by the court, to say whether a fact is proved or otherwise.<sup>220</sup> It is not error for the court to refuse to instruct the jury upon a point in relation to which there is no evidence.<sup>221</sup> Or where there is only such slight evidence as is plainly insufficient to establish it, it is proper for the court to instruct the jury to that effect, and withdraw the point from their consideration.<sup>222</sup> Or which assumes a certain fact to exist, respecting which evidence has been introduced before the jury.<sup>223</sup>

How far it is necessary and proper for the judge to refer to and comment upon the evidence in the charge is a question of discretion.<sup>224</sup> It is not error for the judge to intimate an opinion on a question of fact, if the determination of the question is left by him to the jury.<sup>225</sup> The judge is not at liberty to state his opinion on any question, on the supposition that it is a question of law, and afterwards to submit it to the jury as a question of fact. If it is a matter of fact in dispute, he has no right to state his conclusions thereon; if it is a matter of law, he has no right to leave it to the jury.<sup>226</sup> The constitutional right of the court "to state the testimony" to the jury would

<sup>215</sup> *People v. Hurley*, 8 Cal. 390; *People v. Ramirez*, 13 id. 152.

<sup>216</sup> *Branger v. Chevalier*, 9 Cal. 353.

<sup>217</sup> *Davis v. Davis*, 26 Cal. 44; 85 Am. Dec. 157.

<sup>218</sup> *Crawford v. Roberts*, 50 Cal. 236; *Sperry v. Spaulding*, 45 id. 544; *Pratt v. Ogden*, 34 N. Y. 22; *Hope v. Lawrence*, 50 Barb. 258.

<sup>219</sup> *Treadwell v. Wells*, 4 Cal. 260.

<sup>220</sup> *People v. Dick*, 32 Cal. 213; *Larsen v. Navigation Co.*, 19 Oreg. 240.

<sup>221</sup> *Crawford v. Roberts*, 50 Cal. 236; *People v. Hurley*, 8 id. 390.

<sup>222</sup> *Selden v. Cashman*, 20 Cal. 56; 81 Am. Dec. 93.

<sup>223</sup> *Preston v. Keys*, 23 Cal. 193.

<sup>224</sup> *Poler v. N. Y. C. R. R.*, 16 N. Y. 480.

<sup>225</sup> *Althrop v. Wolf*, 2 Hilt. 344.

<sup>226</sup> *Vedder v. Fellows*, 20 N. Y. 126.

hardly authorize a judge to express his opinion as to its effect.<sup>227</sup> A charge to the jury, telling them that, in determining a particular issue material to the case, the court thought they "could have no hesitation whatever," taken in connection with the rest of the charge, was an intimation that the evidence sufficiently established the fact in question, and was erroneous.<sup>228</sup> But where no other conclusion can be arrived at from the evidence, the error will not justify a reversal.<sup>229</sup> Where the charge of the court, taken as a whole, fairly submitted the case to the jury, the judgment will not be disturbed because some instructions were refused which could properly have been given, or that some of those given are subject to verbal criticism.<sup>230</sup> In New York, if a request involve several propositions, error in any justifies its refusal. The attention of the court should be drawn to each and every specific ruling.<sup>231</sup> And the proposition submitted must be good in all its parts, or refusal will not be error.<sup>232</sup> The same rule is laid down as to the offer of evidence.<sup>233</sup>

§ 4689a. **Refusal of instructions — continued.** It is not error to refuse instructions wholly unwarranted by the facts.<sup>234</sup> In an action triable by the court either with or without a jury, only certain specific questions of fact are required to be answered by the jury, subject to the power of the court to accept or reject

<sup>227</sup> *Seligman v. Kalkman*, 8 Cal. 216.

<sup>228</sup> *People v. Dick*, 34 Cal. 663.

<sup>229</sup> *Pico v. Stevens*, 18 Cal. 377.

<sup>230</sup> *Brooks v. Crosby*, 22 Cal. 43.

<sup>231</sup> *Magee v. Badger*, 34 N. Y. 247; 90 Am. Dec. 691.

<sup>232</sup> *Wright v. Paige*, 36 Barb. 438, 443; see *Doughty v. Hope*, 8 Den. 594; S. C., 1 N. Y. 79; *Zabriskie v. Smith*, 13 id. 332; 64 Am. Dec. 551; *Cronk v. Canfield*, 31 Barb. 171; *Magee v. Badger*, 50 id. 246; *Griggs v. Howe*, 2 Keyes, 581; *Jones v. Osgood*, 6 N. Y. 233. An instruction asked as a whole, which is erroneous in part, is properly refused, though another part of the instruction is correct. *Marriner v. Dennison*, 78 Cal. 202; *Williamson v. Tobey*, 86 id. 497; and see *United States v. Musser*, 4 Utah, 153.

<sup>233</sup> *Hosley v. Black*, 28 N. Y. 438; 26 How. Pr. 97. For the practice in New York, consult further *Taylor v. Atlantic Mutual Ins. Co.*, 9 Bosw. 369; *Gurney v. Smithson*, 7 id. 396; *McIntyre v. Clapp*, 31 N. Y. 569; *Magee v. Badger*, 34 id. 247, 383; 90 Am. Dec. 691; *Patchin v. Peck*, 38 id. 39; *Hoxie v. Allen*, id. 179; *Fountain v. Pettee*, id. 184; *Meyer v. Flegel*, 34 How. Pr. 434; *Mallory v. Tloga R. R. Co.*, 5 Abb. Pr. (N. S.) 420; *Bunnell v. Greathead*, 49 Barb. 106.

<sup>234</sup> *Fitzgerald v. Clark*, 17 Mont. 100; *Roberts v. Parrish*, 17 Oreg. 583.

the answers in whole or in part, it is not error for the court to refuse to instruct the jury.<sup>235</sup> The refusal of the trial court, in an action in equity, to give proper instructions to the jury is not ground for reversal, where the court finds upon all the issues in the case, and the evidence is sufficient to warrant the findings.<sup>236</sup> An instruction which is misleading and erroneous should be refused on that ground, and, upon appeal, it is not necessary to determine whether another reason given by the court for refusing it was valid or not.<sup>237</sup> Instructions must be applicable, or must be based upon evidence. If not pertinent to the evidence in the case, they are properly refused.<sup>238</sup> Nor is it harmful error to refuse to instruct the jury as to what they already know in reference to their right to consider evidence which had been admitted before them without objection.<sup>239</sup> And failure to give more explicit instructions is not error, unless further instructions have been requested.<sup>240</sup> When, on account of the condition of the record, it is impossible to understand the evidence, it will be presumed that the court below properly refused the instructions requested.<sup>241</sup> In the absence of any allegation of special damages the refusal of the court to give the following instruction was held to be erroneous: "The plaintiff having neither pleaded nor proved any special damages resulting from the alleged frightening of the horses, he can recover nothing from that cause."<sup>242</sup> When proper instruc-

<sup>235</sup> *Saint v. Guerrero*, 17 Cal. 448. When court may properly refuse to submit question of fact to jury. See *Janin v. London, etc., Bank*, 92 Cal. 14.

<sup>236</sup> *Riley v. Martinelli*, 97 Cal. 575; *Hewlett v. Pilcher*, 85 id. 545. The verdict of a jury in an equity case is merely advisory, and error in the instructions is immaterial. *Schneider v. Brown*, 85 Cal. 205; *Sweetser v. Dobbins*, 65 id. 531.

<sup>237</sup> *Low v. Warden*, 77 Cal. 94; and see *Fox v. Harvester, etc., Works*, 83 id. 333; *Leak v. Railway Co.*, 9 Utah, 246; *Clay Co. v. Harvey*, id. 497.

<sup>238</sup> *Brownell v. McCormick*, 7 Mont. 12; *Hill v. Corcoran*, 15 Cal. 270; *Dozenback v. Raymer*, 13 id. 451; *Razzo v. Narni*, 81 Cal. 289; *Shepherd v. Jones*, 71 id. 223; *Woo Dan v. Railway Co.*, 5 Wash. 466; and see § 4688, *ante*.

<sup>239</sup> *Chalmers v. Chalmers*, 81 Cal. 81.

<sup>240</sup> *Rice v. Whitmore*, 74 Cal. 619.

<sup>241</sup> *Fugate v. Smith*, 4 Col. App. 201.

<sup>242</sup> *Larsen v. Navigation Co.*, 19 Oreg. 240. Erroneous refusal of the court to charge the jury as to the legal effect of the complaint as an exhibit. See *Tingley v. Fairhaven Land Co.*, 9 Wash. St. 34.

tions are refused, and the record on appeal shows affirmatively that there were no other such instructions given, the judgment must be reversed.<sup>243</sup>

**§ 4689b. Instructions — how construed.** Instructions are to be read and considered in the light of the pleadings and evidence in the case.<sup>244</sup> They are to be read and considered as a whole;<sup>245</sup> and the fact that when taken separately some of them may fail to enunciate in precise terms, and with legal accuracy, propositions of law, does not necessarily render them erroneous. It is sufficient if all the instructions taken together, and not being inconsistent with each other or confusing, shall give to the jury a fair and just notion of the law upon the point discussed.<sup>246</sup>

**§ 4689c. The same — modification or amendment of.** It is not error for the court to modify instructions asked by counsel before giving them.<sup>247</sup> It is the duty of the court to make any and all corrections of the instructions, when reduced to writing, necessary to their validity.<sup>248</sup> The trial court has the right to amend an imperfect instruction, and its action in making the amendment is not error, if, when given as amended, the instruction states the law correctly.<sup>249</sup> Where the only objection to an instruction is that it is too general in its terms, the proper practice is to move to make it more specific.<sup>250</sup>

**§ 4689d. The same — presumptions.** When the record is silent as to what instructions the court gave the jury, the legal intendment is that they were properly instructed, and he who alleges error must make it affirmatively appear from the

<sup>243</sup> *Stanton v. French*, 83 Cal. 194.

<sup>244</sup> *Elder v. Schumacker*, 18 Col. 433.

<sup>245</sup> *Hanscom v. Drullard*, 79 Cal. 234; *Cousins v. Partridge*, 79 id. 224; *Monaghan v. Rolling Mill Co.*, 81 id. 190; *Bradbury v. Butler*, 1 Col. App. 430; *Coleman v. Davis*, 13 Col. 98; *People v. Fehrenbach*, 102 Cal. 394.

<sup>246</sup> *Stephenson v. South. Pac. Co.*, 102 Cal. 143; *Seattle Gas, etc., Co. v. Seattle*, 6 Wash. St. 101; *Duggan v. Boom Co.*, id. 593; *Hamer v. National Bank*, 9 Utah, 215; *North. Pac. R. Co. v. Hess*, 2 Wash. St. 383; *Kennon v. Gilmer*, 5 Mont. 257; *Flitschen v. Thomas*, 9 id. 52.

<sup>247</sup> *King v. Davis*, 34 Cal. 100; and see *Knapp v. King*, 6 Oreg. 243.

<sup>248</sup> *Rice v. Goodridge*, 9 Col. 237.

<sup>249</sup> *People v. Hall*, 94 Cal. 595.

<sup>250</sup> *Enoch v. Railway Co.*, 6 Wash. St. 393.

record.<sup>251</sup> So where the jury are correctly instructed as to the applicability of the evidence before them, it is a presumption of law that they exercised their jurisdiction soundly.<sup>252</sup>

§ 4689e. **The same — duty of jury to follow.** The instructions of the court are the law of the case, so far as the jurors are concerned, and they are bound to follow them, whether they deem them correct or not.<sup>253</sup> The jury are bound to accept all the instructions of the court as correct;<sup>254</sup> and they can no more be permitted to look beyond the instructions of the court to ascertain the law than they would be allowed to go outside of the evidence to find the facts of the case.<sup>255</sup>

§ 4689f. **The same — error, when cured.** Error in refusing to give proper instructions is cured if the court subsequently give an instruction covering the same ground.<sup>256</sup> So where objectionable features in instructions are covered by other paragraphs stating the law clearly and correctly, the error is cured.<sup>257</sup> But the giving of erroneous instructions is not cured by the giving of others which are inconsistent therewith, correctly stating the law.<sup>258</sup>

§ 4690. **Conduct of the jury.** After hearing the charge, the jury may either decide in court or retire for deliberation.<sup>259</sup> Should they retire for deliberation, the officer of the court, having first been sworn not to communicate nor allow others to communicate with them, conducts them to the jury room, where they deliberate upon and make up their verdict.<sup>260</sup> They may

<sup>251</sup> Coffin v. Taylor, 16 Oreg. 375.

<sup>252</sup> People v. Rogers, 71 Cal. 565. Where conflicting charges are given, one of which is erroneous, it is to be presumed that the jury may have followed that which is erroneous. People v. Hancock, 7 Utah, 180; People v. Berlin, 10 id. 39.

<sup>253</sup> Lind v. Class, 88 Cal. 6; Loveland v. Gardner, 79 id. 317.

<sup>254</sup> Sappenfield v. Railroad Co., 91 Cal. 48.

<sup>255</sup> Emerson v. Santa Clara County, 40 Cal. 543.

<sup>256</sup> Manning v. Dallas, 73 Cal. 420.

<sup>257</sup> Cameron v. Union Trunk Line, 10 Wash. St. 507.

<sup>258</sup> Sappenfield v. Railroad Co., 91 Cal. 48; Miller v. Vermurle, 7 Wash. St. 386.

<sup>259</sup> Cal. Code Civ. Pro., § 610.

<sup>260</sup> There is no provision in the Code requiring the court to administer a special oath to the officer taking charge of the jury upon its retirement for deliberation, and it is in the discretion of the court to administer a special oath or not. The Code contemplates



take with them all papers which have been received as evidence in the cause, except depositions, or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony or other proceedings of the trial taken by themselves, or any of them, but none taken by any other persons.<sup>261</sup> They may come into court for information upon the testimony, in case of a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause. Upon their being brought into court, the information required must be given in the presence of or after notice to the parties or counsel.<sup>262</sup> If the court reads to the jury all the instructions for which they ask, it is sufficient. All the instructions need not be read again.<sup>263</sup> The judge may keep the jury together as long as in his judgment there is any reasonable prospect of their being able to agree.<sup>264</sup> But he has no right to threaten or intimidate them in order to affect their deliberations.<sup>265</sup> A new trial will not be granted because the judge tells them, through the sheriff, that if they do not agree in five minutes they must remain in the jury room all night.<sup>266</sup> It is the province of the jury to determine from the evidence the issues of fact, and their decision is final.<sup>267</sup> Having determined upon their verdict, they are

that the official oath of the officer is sufficient. *Boreham v. Byrne*, 83 Cal. 23.

<sup>261</sup> Cal. Code Civ. Pro., § 612; *Howland v. Willetts*, 9 N. Y. 170; *Porter v. Mount*, 45 Barb. 422; see *McLean v. Crow*, 88 Cal. 644; *Cockrill v. Hall*, 76 id. 192. The pleadings should not be sent out with the jury. *Spaulding v. Saltiel*, 18 Col. 86. And it is held to be bad practice to permit a jury to take a written charge to the jury room. *Smith v. Lownsdale*, 6 Oreg. 78.

<sup>262</sup> Cal. Code Civ. Pro., § 614.

<sup>263</sup> *Russell v. Dennison*, 45 Cal. 338.

<sup>264</sup> *Green v. Telfair*, 11 How. Pr. 260.

<sup>265</sup> Id.

<sup>266</sup> *People v. Hughes*, 29 Cal. 258.

<sup>267</sup> *McCauley v. Weller*, 12 Cal. 500. Jurors are bound upon their oaths and consciences to act intelligently, not blindly. *Knight v. Fisher*, 15 Col. 176. The weight of the evidence and the credibility of the witnesses are matters of which the jury are the proper judges. *Simonton v. Rohm*, 14 Col. 51; *Morey v. Harvey*, 18 id. 40; *Stone v. Crow*, 2 S. Dak. 525; *Colorado, etc., Railway Co. v. O'Brien*, 16 Col. 219; *State v. Daly*, 16 Oreg. 240; *Tibballs v. Water Co.*, 10 Wash. St. 329; *Halley v. Folsom*, 1 N. Dak. 325; *Oppenheimer v. Railroad Co.*, 9 Col. 320; *Patterson v. Hayden*, 17 Oreg. 238; 11 Am. St. Rep. 622;



brought into court by the officer, and through their foreman they declare the same. \* If it be a sealed verdict, it is read by the clerk, so that parties may be distinctly informed of its purport.<sup>268</sup>

If after the impaneling a jury, and before verdict, a juror become sick so as to be unable to perform his duty, the court may order him to be discharged. In that case the trial may proceed with the other jurors, or another juror may be sworn, and the trial begin anew, or the jury may be discharged, and a new jury then or afterwards impaneled.<sup>269</sup> In all cases where the jury are discharged or prevented from giving a verdict by reason of accident or other cause, during the progress of the trial, or after the cause is submitted to them, the action may be again tried immediately, or at a future time, as the court may direct.<sup>270</sup> The court may receive a verdict or discharge a jury on Sunday or a holiday, and on such day may adjudicate the fact that the jury can not agree.<sup>271</sup> The court must adjudicate this fact upon some kind of evidence, such as their being called into court and pronouncing their inability to agree in presence of the court and parties.<sup>272</sup> A final adjournment of the court for the term discharges the jury.<sup>273</sup> While the jury are absent the court may adjourn from time to time in respect to other

compare *Denver Tramway Co. v. Owens*, 20 Col. 107. Where the evidence leaves a question of fact in dispute, doubt, or uncertainty, such fact should be determined by the jury. *Rauber v. Sunback*, 1 S. Dak. 268; and see *Hartwig v. Lumber Co.*, 19 Oreg. 522. But a jury can not perform the functions of appraisers. *Denver, etc., R. R. Co. v. Costes*, 1 Col. App. 336; compare *Cederberg v. Robison*, 100 Cal. 93.

<sup>268</sup> *Blum v. Pate*, 20 Cal. 70.

<sup>269</sup> Cal. Code Civ. Pro., § 615. *Excusing juror.*— The right of a party to an action to have the cause tried by an impartial jury does not give him any right to have it tried by any particular jurors, and the act of the court in excusing a juror does not give an available exception to a party objecting thereto, even if such juror is competent to act in the case. *Asevado v. Orr*, 100 Cal. 294. Practice where juror is discharged because of sickness. See *People v. Brady*, 72 Cal. 490; *People v. Wong Ark*, 96 id. 125; *People v. Stewart*, 64 id. 60; *State v. Hazledahl*, 2 N. Dak. 522.

<sup>270</sup> Cal. Code Civ. Pro., § 616.

<sup>271</sup> *People v. Lightner*, 49 Cal. 228; and see *People v. Soto*, 65 id. 621.

<sup>272</sup> *People v. Cage*, 48 Cal. 326; 17 Am. Dec. 436.

<sup>273</sup> Cal. Code Civ. Pro., § 617; see *People v. Cage*, 48 Cal. 326; 17 Am. Dec. 436; *Himmelman v. Fitzpatrick*, 50 id. 649.

business, but it is nevertheless open for any purpose connected with the case submitted to the jury until a verdict is rendered or the jury discharged.<sup>274</sup> The court may direct the jury to bring in a sealed verdict.<sup>275</sup>

**§ 4690a. View of property or premises by jury.** When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation, or the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person other than the person so appointed shall speak to them on any subject connected with the trial.<sup>276</sup> It is a matter resting in the sound discretion of the trial court to grant or refuse a request to have the jury view the premises or property in litigation.<sup>277</sup> The jury having viewed the property which is the subject of litigation, may properly take into consideration the result of their observations in connection with the evidence in deliberating upon their verdict.<sup>278</sup>

**§ 4690b. Withdrawal of case from jury.** Where the testimony is substantially conflicting, but the clear weight of the evidence is with either side, the court is justified in taking the decision of the case from the jury.<sup>279</sup> As a general rule, on an application to take the case from the jury, whether by motion for a nonsuit, or the direction of a verdict, or by demurrer to evidence, the evidence of the opposite party must be assumed to be true, and he is to be given the benefit of all legitimate inferences therefrom in his favor.<sup>280</sup>

<sup>274</sup> Cal. Code Civ. Pro., § 617.

<sup>275</sup> Id.; see *Palge v. O'Neal*, 12 Cal. 488.

<sup>276</sup> Cal. Code Civ. Pro., § 613.

<sup>277</sup> *Saint v. Guerrierio*, 17 Col. 448; *Klepsch v. Donald*, 4 Wash. St. 436; 31 Am. St. Rep. 939; *Bellingham, etc., R. R. Co. v. Strand*, 4 Wash. St. 311; and see *Keller v. Bley*, 15 Oreg. 429.

<sup>278</sup> *Ormund v. Mining Co.*, 11 Mont. 303.

<sup>279</sup> *Guley v. Transportation Co.*, 7 Wash. St. 491; *Corning v. Troy, etc., Nail Factory*, 44 N. Y. 577.

<sup>280</sup> *Marshall v. Manuf. Co.*, 1 S. Dak. 350; *Walker v. Supple*, 54 Ga. 178; *Maynes v. Atwater*, 88 Penn. St. 496; *Myers v. Dixon*, 45 How. Pr. 48. Where the facts show negligence on the part of the plaintiff contributing to the accident, the case may be withdrawn from the jury. *Man v. Morse*, 3 Col. App. 359; *Brown v. Railroad Co.*, 22 Minn. 165; *Railroad Co. v. Ryan*, 17 Col. 103.

§ 4690c. **Fees of jury.** A rule of the Superior Court requiring a party demanding a trial by jury to deposit the jury fees with the clerk in advance of the trial is a reasonable regulation of the mode of enjoyment of the right of trial by jury, and is not a denial or impairment of the right. And such party, upon refusing to comply with the rule, waives his right to a jury.<sup>281</sup> Under the California statute (act of 1871-1872, p. 188), trial jurors are entitled to *per diem* compensation only when they are in attendance upon the court, and are not entitled to any compensation during the time when they are excused by the court from attendance.<sup>282</sup> The trial court may stay all proceedings in an action until the party in whose favor a verdict has been rendered pays the fees of the jury and the reporter.<sup>283</sup>

§ 4691. **Amendment of verdict.** The court may amend the verdict of a jury when it is defective in something merely formal, and which has no connection with the merits of the case, where the amendment in no respect changes the rights of the parties.<sup>284</sup> The right to correct does not depend upon the judgment, and the steps necessary for that purpose must be taken in the statutory time.<sup>285</sup> When the verdict is announced, if it is informal or insufficient in not covering the issue submitted, it may be corrected under the advice of the court, or the jury may be again sent out.<sup>286</sup> But error in substance can not be corrected by motion.<sup>287</sup> If the court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment, and go beyond the verdict, it is error.<sup>288</sup>

§ 4692. **Chance verdict.** A verdict to which the assent of any of the jurors was obtained by a resort to chance will be set

<sup>281</sup> *Conneau v. Gels*, 73 Cal. 176; 2 Am. St. Rep. 285.

<sup>282</sup> *Jacobs v. Elliott*, 104 Cal. 318.

<sup>283</sup> *Rhodes v. Spencer*, 68 Cal. 199; see *Freshour v. Hihn*, 99 id. 443.

<sup>284</sup> *Perkins v. Wilson*, 3 Cal. 139; *Schoolfield v. Brunton*, 20 Cal. 139; *Marine Sav. Bank v. Young*, 5 Wash. St. 394; *Frohner v. Rodgers*, 2 Mont. 179; *Osborne v. Morris*, 21 Oreg. 367; see *Morris v. Burke*, 15 Mont. 214; *Truebody v. Jacobson*, 2 Cal. 269.

<sup>285</sup> *Allen v. Hill*, 16 Cal. 113.

<sup>286</sup> Cal. Code Civ. Pro., § 619. See, as to the power of correcting mere technical errors, *Wells v. Cox*, 1 Daly, 515.

<sup>287</sup> *Brush v. Kohn*, 9 Bosw. 589.

<sup>288</sup> *Ross v. Austhill*, 2 Cal. 183.

aside;<sup>289</sup> such verdicts being regarded in the same light as gambling verdicts.<sup>290</sup> When jurors agree each one to mark down the sum he thinks proper to find as damages, and then to divide the whole amount of those sums by the number of persons composing the jury, which result shall be their verdict, a verdict thus found is irregular, and will be set aside.<sup>291</sup> But if such means be adopted without any being bound thereby, and afterwards the jury agree upon such sum, the court will not disturb the verdict.<sup>292</sup> Such verdict is not a chance verdict within the meaning of subdivision 2 of section 193 of the California Practice Act;<sup>293</sup> but is vicious, and should be set aside if the facts were proved by competent testimony.<sup>294</sup>

**§ 4693. Character and form of verdict.** When the party does not rely in his pleadings upon an estoppel, but himself opens the truth or falsehood of the facts which he claims that the other party is estopped to aver or deny, and makes the truth of these facts the very issue which the jury are called upon to try, the jury are bound to find according to the real truth of the facts proved before them.<sup>295</sup> The terms and expressions in the pleading will not necessarily give character to or determine the effect or meaning of the verdict.<sup>296</sup> A recovery, if had, must be grounded upon the facts which are averred in the complaint, and not upon those which are denied.<sup>297</sup> The verdict must be confined to the matters put in issue by the pleadings.<sup>298</sup> A verdict need not be entitled at all.<sup>299</sup> The verdict of a jury in

<sup>289</sup> See Cal. Code Civ. Pro., § 657, subd. 2; *Donner v. Palmer*, 23 Cal. 40.

<sup>290</sup> *Wilson v. Berryman*, 5 Cal. 44; 63 Am. Dec. 78.

<sup>291</sup> *Wilson v. Berryman*, 5 Cal. 45; 63 Am. Dec. 78.

<sup>292</sup> *Id.*

<sup>293</sup> Code Civ. Pro., § 657; *Boyce v. Cal. Stage Co.*, 25 Cal. 460.

<sup>294</sup> *Turner v. Tuolumne Co. Wat. Co.*, 25 Cal. 397. *Chance verdict.*—Upon this subject, see *Dixon v. Pluns*, 98 Cal. 384; 35 Am. St. Rep. 180; *Goodman v. Cody*, 1 Wash. Ter. 329; 34 Am. Rep. 808; *Gordon v. Trevarthen*, 13 Mont. 387; 40 Am. St. Rep. 452; *Improvement Co. v. Adams*, 1 Col. App. 250; § 4875, *post*.

<sup>295</sup> *Anthony v. Brayton*, 7 R. I. 52; see Cal. Code Civ. Pro., §§ 1908, 1962.

<sup>296</sup> *McLaughlin v. Kelly*, 22 Cal. 212.

<sup>297</sup> *Gregory v. Haworth*, 25 Cal. 653.

<sup>298</sup> *Benedict v. Bray*, 2 Cal. 251; 56 Am. Dec. 332; *Truebody v. Jacobson*, 2 Cal. 285; *Marquard v. Wheeler*, 52 *id.* 445.

<sup>299</sup> *McGarrity v. Byington*, 12 Cal. 426.

a chancery case is only advisory to the chancellor or this court,<sup>300</sup> and may be disregarded.<sup>301</sup>

**§ 4694. Claim and delivery, form of verdict in actions for.** In actions for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property; and may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the taking or detention of such property.<sup>302</sup> Where there has been a nonsuit in the original action, these questions are open on the trial of an action on the replevin bond.<sup>303</sup>

**§ 4695. Conclusiveness of verdict.** The finding of a jury, or of the court below acting as a jury, upon a question of fact is final and conclusive.<sup>304</sup> A verdict found on any fact or title distinctly put in issue is conclusive in another action between the same parties or their privies in respect of the same fact or title;<sup>305</sup> but the fact or title must be material or relevant;<sup>306</sup> and the court will intend that the verdict settles every question of fact litigated upon the trial.<sup>307</sup> A general rule has been

<sup>300</sup> *Still v. Saunders*, 8 Cal. 281; *James v. Superior Ct.*, 78 id. 107; *Kellogg v. Kellogg*, 21 Col. 181; *Clavey v. Lord*, 87 Cal. 413; *McDonald v. Thompson*, 16 Col. 13; and see § 4618, *ante*. Where a case is tried by the court without a jury, the findings of the court upon the facts shall be deemed a verdict. *Kyle v. Rippey*, 19 Oreg. 186.

<sup>301</sup> *Goode v. Smith*, 13 Cal. 84; *Wingate v. Ferris*, 50 id. 105; *Johnson v. Powers*, 65 id. 179; *Sweetzer v. Dobbins*, id. 529.

<sup>302</sup> Cal. Code Civ. Pro., § 627. This section does not apply to a nonsuit. *Form and sufficiency of verdict in replevin*.—See *Johnson v. Fraser*, 2 Idaho, 371; *Blackfoot Stock Co. v. Delamue*, id. 1017; *Quinn v. Machinery Co.*, 5 Wash. St. 276; *Cattle Co. v. Slaughter*, 6 Utah, 278; *Smith v. Smith*, 17 Oreg. 444; *Corball v. Childers*, 17 id. 528; *Ohandler v. Colcord*, 1 Okl. 260; *Kuhlman v. Williams*, id. 136; *Stewart v. Taylor*, 68 Cal. 5; *Ryan v. Fitzgerald*, 87 id. 345.

<sup>303</sup> *Glinica v. Atwood*, 8 Cal. 446.

<sup>304</sup> *Perry v. Cochran*, 1 Cal. 180; *Duff v. Fisher*, 15 id. 380; *Hurd v. Atkins*, 1 Cal. App. 449; *Woods v. Courtney*, 16 Oreg. 121.

<sup>305</sup> *Kidd v. Laird*, 15 Cal. 161; 76 Am. Dec. 472.

<sup>306</sup> See, as to presumption in favor of correctness of verdict, not clearly designating its precise import, *Carpenter v. Simmons*, 28 How. Pr. 12.

<sup>307</sup> *Wolf v. Goodhue Fire Ins. Co.*, 43 Barb. 400.

maintained that the verdict of a jury is conclusive upon the question of fact submitted to them, if there be any evidence to support it.<sup>308</sup> A verdict is never conclusive upon immaterial or collateral issues.<sup>309</sup> Where there is such overwhelming evidence against the verdict as to justify the conclusion that it was rendered under the influence of passion or prejudice, or bias of some kind, a new trial should be granted, even though there be some conflict.<sup>310</sup>

**§ 4696. Directing verdict.** The Practice Act confers express authority upon the courts below to direct a special verdict;<sup>311</sup> and the court must determine what particular facts the jury shall find specially, and neither party has the right to dictate terms.<sup>312</sup> And where special issues are submitted to a jury, they should include all questions of fact raised by the pleadings, and should be separately and distinctly stated.<sup>313</sup> In all cases the court may instruct the jury, if they render a general verdict, to find upon particular questions of facts, to be stated in writing.<sup>314</sup> Where there is no dispute as to facts, and the law upon these facts declares a transaction fraudulent, it is not a question for the jury. The court in such case may direct the jury how to find or set aside the verdict, if they find to the contrary.<sup>315</sup>

<sup>308</sup> Noonan v. Hood, 49 Cal. 294; Trenor v. C. P. R. R. Co., 50 id. 222; Miller v. Lockwood, 32 N. Y. 293; Hyatt v. Trustees of Rondout, 44 Barb. 385; Fleming v. Smith, id. 554; Kavanaugh v. Beckwith, id. 192; People v. Townsend, 37 id. 520; Cothran v. Collins, 29 How. Pr. 155; Decker v. Myers, 31 id. 372; Lewis v. Blake, 10 Bosw. 198.

<sup>309</sup> McDonald v. Bear River & Auburn Water and Mining Co., 15 Cal. 145. See qualification of rule as regards verdict manifestly against evidence. Suydam v. Grand Street & Newtown R. R. Co., 41 Barb. 375; S. O., 17 Abb. Pr. 304; Greer v. Mayor of New York, 1 Abb. Pr. (N. S.) 206.

<sup>310</sup> Dickey v. Davis, 39 Cal. 569; Mason v. Austin, 46 id. 387; Sherman v. Mitchell, id. 579; see, generally, "New Trials" and "Appeals," *post*.

<sup>311</sup> Burritt v. Gibson, 3 Cal. 396; see § 4705, *post*.

<sup>312</sup> American Co. v. Bradford, 27 Cal. 360.

<sup>313</sup> Phoenix Water Co. v. Fletcher, 23 Cal. 482.

<sup>314</sup> Cal. Code Civ. Pro., § 625.

<sup>315</sup> Chenery v. Palmer, 6 Cal. 119; 65 Am. Dec. 493. *Directing verdict.*—It is proper for the court to direct a verdict in all cases where there is no disputed question of fact to be submitted to the jury. In any case where there is no evidence to warrant an adverse verdict, and where the court would feel bound to set aside such

§ 4697. **Entry of verdict.** Upon receiving a verdict an entry must be made by the clerk in the minutes of the court, specifying the time of trial, the names of the jurors and witnesses, and setting out the verdict at length; and where special verdict is found, either the judgment rendered thereon or the order reserving it for argument or further consideration.<sup>316</sup> That will be treated as the verdict which the jury actually bring in, and the court should direct it to be recorded as rendered.<sup>317</sup>

verdict if rendered, it is proper for the court to direct a verdict for the party entitled thereto. *Armijo v. Town Co.*, 3 N. Mex. 244; and see, also, *Coffin v. Hutchinson*, 22 Oreg. 554; *Hangeir v. Railroad Co.*, 3 S. Dak. 395; *Longley v. Daly*, 1 id. 257; *Peet v. Insurance Co.*, id. 462; *Martin v. Ward*, 69 Cal. 129; *Bowman v. Eppinger*, 1 N. Dak. 21. Where the evidence is such that it is clearly insufficient to support a verdict in favor of the party against whom the direction is given, the instruction is proper, unless the circumstances of the case indicate that upon another trial the evidence may be materially different, in which case the facts should be submitted to the jury in order that a new trial may be had; but, in either case, the decision of the trial court will be sustained, unless it clearly appears that its conclusion is wrong upon the facts. *Lacey v. Porter*, 103 Cal. 597. When verdict should be directed for plaintiff. See *Campbell v. Clay*, 4 Col. App. 551; *Clancy v. Reis*, 5 Wash. St. 371. When for defendant. See *Bassinger v. Spangler*, 9 Col. 175; *Chivington v. Col. Springs Co.*, id. 597. A court of the United States has authority to direct a jury to find a verdict for a defendant, and it should always do so when it will not permit a verdict for the plaintiff to stand. *Alexander v. Tenn., etc., Min. Co.*, 3 N. Mex. 173. The court may direct the jury to bring in a sealed verdict at the opening of court in case of an agreement during recess or adjournment for the day, but a final adjournment for the term, by operation of law, discharges the jury and renders it incompetent to return a verdict. *Anderson v. Hulet*, 4 Col. App. 448; Cal. Civ. Code, § 194.

<sup>316</sup> Cal. Code Civ. Pro., § 628; and see *Von Schmidt v. Widber*, 99 Cal. 515.

<sup>317</sup> *Moody v. McDonald*, 4 Cal. 297. The court has no right to direct the jury to find a designated verdict. *Smith v. Shattuck*, 12 Oreg. 362. It can not, in an action at law, enter a verdict contrary to the will of the jury, or substitute its judgment for theirs and assume the power to decide issues of fact once submitted to the jury, or render a judgment contrary to the verdict. *Montgomery v. Sayre*, 91 Cal. 206. When a verdict is rendered and recorded the jury is *functus officio*. Prior to that time the verdict is in the control of the jury in some respects, but after those events the province of the jury is exhausted. *In re Thompson*, 9 Mont. 381; *Morris v. Burkes*, 15 id. 214.



§ 4698. **Errors cured.** A defective allegation of a fact may be cured by verdict, but not the absence of an allegation.<sup>318</sup> The failure to aver performance is cured by verdict.<sup>319</sup> So in a verified complaint where a special demand is essential, the error of a general averment of demand is cured by verdict.<sup>320</sup> After verdict, defects in substance in the declaration are cured if the issue joined be such as necessarily required on the trial proof of the facts defectively or imperfectly stated or omitted; and the court will presume that the facts showing the right were proved.<sup>321</sup> Where the complaint contains the substantial averments of a cause of action, though defective in form and certainty, the defect is cured by verdict.<sup>322</sup>

§ 4699. **General verdict.** A general verdict is that by which a jury pronounces generally upon all or any of the issues, either in favor of the plaintiff or defendant.<sup>323</sup> In an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict.<sup>324</sup> A general verdict will include all parties who do not answer separately or demand separate verdicts.<sup>325</sup> Its effects will be limited to such issues as necessarily controlled the action of the jury.<sup>326</sup> In an action to recover the possession of land, the following

<sup>318</sup> *Hentsch v. Porter*, 10 Cal. 555.

<sup>319</sup> *Happe v. Stout*, 2 Cal. 460.

<sup>320</sup> *Mills v. Barney*, 22 Cal. 240; *Jones v. Block*, 30 id. 227.

<sup>321</sup> *Stanley v. Whipple*, 2 McLean, 35; see *Garland v. Davis*, 4 How. (U. S.) 131, 145; *Brent, Ex'rs of, v. Bank of the Metropolis*, 1 Pet. 89.

<sup>322</sup> *People v. Rains*, 23 Cal. 127; see *Garner v. Marshall*, 9 id. 268. *Defective pleading aided or cured by verdict.*—See *School District v. Ross*, 4 Col. App. 493; *Aiken v. Collidge*, 12 Oreg. 244; *Wild v. Railroad Co.*, 21 id. 159; *Harkness v. McClain*, 8 Utah, 52. The verdict does not supply any fact omitted from a pleading, but it establishes every reasonable inference that can be drawn therefrom. *Weiner v. Lee Shing*, 12 Oreg. 276. The doctrine that a defective pleading may be cured by verdict can have no application where there is an entire absence of a material allegation. *Richards v. Insurance Co.*, 80 Cal. 505; and see *Hazard Powder Co. v. Volger*, 3 Wyo. 189.

<sup>323</sup> Cal. Code Civ. Pro., § 624.

<sup>324</sup> Id., § 625; see, also, *Meyers v. Hart*, 3 Col. App. 392; *Thompson v. Gregor*, 11 Col. 531; § 4705, *post*.

<sup>325</sup> *Winans v. Christy*, 4 Cal. 70; 60 Am. Dec. 597; *Ellis v. Jeans*, 7 id. 409.

<sup>326</sup> Id.; *McDonald v. Bear River & Auburn Water and Mining Co.*, 15 Cal. 145.



verdict: "We, the jury in this case, find a verdict in favor of the plaintiff against the defendants, for the possession of the premises described in the complaint herein, and the sum of one hundred and sixty-five dollars damages," was held substantially a general verdict.<sup>327</sup> A general verdict entered on counts of which part are bad is erroneous. But if the good counts set forth a sufficient cause of action it may stand.<sup>328</sup>

§ 4700. **How authenticated.** The verdict of a jury is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the clerk.<sup>329</sup>

§ 4701. **Informal verdict.** Where the declaration in an action of *assumpsit* contained the following counts: 1. On a promissory note; 2. *Indebitatus assumpsit* for the hire of chattels; 3. An account stated; 4. *Quantum valebat* for the service of chattels; 5. Work and labor, goods sold and delivered, and money lent and advanced; 6. Money had and received; 7. An account stated; 8. A special agreement for the hire of chattels; and the defendant pleaded: 1. The general issue; 2. Statute of Limitations; 3. Payment; and the jury found a verdict for "the defendant upon the issue joined, as to the within note of four hundred and fifty-six dollars, and the within account;" this verdict, although informal, was sufficient authority to enter a general judgment for defendant.<sup>330</sup> When the verdict returned by the jury is informal, it is the duty of the court to explain to them its defects, and direct them to put it in proper form.<sup>331</sup> The only object of a verdict is to express in intelligible language the result at which a jury has arrived, and a verdict that the plaintiffs are "entitled to the sum of two thousand five hundred dollars," is equivalent to finding the issues in favor of the plaintiffs and assessing their damages at that sum.<sup>332</sup>

<sup>327</sup> Hutton v. Reed, 25 Cal. 478; see Leese v. Clark, 28 id. 26.

<sup>328</sup> Fry v. Bennett, 28 N. Y. 324. Where the plaintiff sues on two causes of action, but produces no evidence to support the second, a general verdict for the gross amount sued for can not be sustained. Kent v. Abeel, 12 Col. 547.

<sup>329</sup> Reynolds v. Harris, 8 Cal. 618.

<sup>330</sup> Downey v. Hicks, 14 How. (U. S.) 240.

<sup>331</sup> People v. Dick, 34 Cal. 663.

<sup>332</sup> Mendelsohn v. Anaheim L. Co., 40 Cal. 660. A verdict for the recovery of money must be certain as to the amount. Watson v. Damon, 54 Cal. 278; see Estate of Cahill, 74 id. 52.

§ 4702. **Joint verdict.** A joint verdict against answering and defaulting defendants is conclusive against all when a separate verdict has not been demanded.<sup>333</sup> And if no objection or exception is taken to the verdict on that ground in time to afford an opportunity to correct it, the defendants can not afterwards object to the joint verdict and judgment.<sup>334</sup>

§ 4703. **Mining claims, verdict in actions for.** In an action to recover a quartz ledge when defendants deny plaintiffs' title and ouster, and set up title in themselves to a part only in the ledge, a special verdict awarding defendants that portion of the ledge they claim, without a general verdict, if accepted by plaintiffs, is a finding in favor of defendants, and entitles them to costs.<sup>335</sup> The words "more or less," contained in a verdict, give all between the notices.<sup>336</sup>

§ 4704. **Setting aside verdict.** A court may, of its own motion, set aside the verdict of a jury, when clearly and palpably against the evidence.<sup>337</sup> A general objection to the form of a verdict, without any specification of particular defects, will not be considered.<sup>338</sup> A verdict obtained upon incompetent evidence may be set aside, but not if the evidence were admitted without objection.<sup>339</sup> In such case, that which vitiates the verdict is the error of the court in admitting the evidence.<sup>340</sup>

<sup>333</sup> *Anderson v. Parker*, 6 Cal. 197; *Ellis v. Jeans*, 7 id. 409.

<sup>334</sup> *Hicks v. Coleman*, 25 Cal. 122; 85 Am. Dec. 103; see *State v. Weeks*, 23 Oreg. 3.

<sup>335</sup> *Gonzales v. Leon*, 31 Cal. 98.

<sup>336</sup> *Id.* *Verdict in particular actions.*—In an action of ejectment, a general verdict is sufficient, and will not be disturbed on the ground of the insufficiency of the evidence, if the evidence is substantially conflicting. *Joy v. McKay*, 70 Cal. 445. If, in such action, the plaintiff fail to establish his right of possession, a general verdict for the defendant is sufficient in form. *Pike v. Sutton*, 21 Col. 84. Informal, but sufficient verdict in ejectment. See *Johnson v. Visher*, 96 Cal. 310. Verdict in *assumpsit*, agreement as to issues. *Redmond v. Weismann*, 77 Cal. 423. In an action for use and occupation a verdict assessing "damages at \$3,050, and legal interest," is bad for uncertainty, and will not sustain a judgment unless the words "and legal interest," be treated as surplusage. *Mecker v. Gardella*, 1 Wash. St. 139. On the trial of an information in the nature of a *quo warranto*, the respondent is entitled to a trial by jury and to a unanimous verdict. *Bradford v. Territory*, 1 Okl. 366.

<sup>337</sup> *Duff v. Fisher*, 15 Cal. 375.

<sup>338</sup> *Mahoney v. Van Winkle*, 21 Cal. 552.

<sup>339</sup> *McCloud v. O'Neill*, 16 Cal. 392.

<sup>340</sup> *Id.*

But the admission of improper evidence is no ground for setting aside the verdict where no injury was done thereby to the party objecting.<sup>341</sup> Where the law declares certain facts conclusive evidence of fraud, a verdict against such conclusion will be set aside; but where the facts are declared merely presumptive, it is otherwise.<sup>342</sup> The amendment of 1862 to section 193 of the California Practice Act, allowing the affidavits of jurors to be received to impeach their own verdict, relates merely to the remedy, and governs in all applications for new trial made after its passage.<sup>343</sup> Such affidavits are not allowed unless it be a chance verdict which is impeached.<sup>344</sup> A verdict was set aside on the ground of misconduct on the part of the officer in charge.<sup>345</sup> The affidavits of the jurymen who rendered a verdict, that they misunderstood its effect, can not be received to impeach or defeat it.<sup>346</sup>

§ 4704a. The same — continued. A verdict so clearly against an overwhelming weight of testimony that, if not willfully wrong, it could have resulted only from misapprehension or mistake of law, should be set aside.<sup>347</sup> A verdict unsupported by evidence must be set aside.<sup>348</sup> So of a verdict that must have been the result of prejudice, mistake, or bias,<sup>349</sup> But a verdict will not be set aside if the evidence substantially supports it. The verdict must be plainly wrong and manifestly against the weight of the evidence.<sup>350</sup> If there is a substantial conflict in the evidence, a verdict will not be disturbed.<sup>351</sup> And the refusal of

<sup>341</sup> Priest v. Union Canal Co., 6 Cal. 170.

<sup>342</sup> Id.

<sup>343</sup> Donner v. Palmer, 23 Cal. 40.

<sup>344</sup> Turner v. Yuba Water & Mining Co., 25 Cal. 397; Boyce v. Stage Co., id. 460; see § 4692, *ante*.

<sup>345</sup> Thomas v. Chapman, 45 Barb. 98; see "New Trial."

<sup>346</sup> Polhemus v. Helman, 50 Cal. 438.

<sup>347</sup> Lawrence v. Weir, 3 Col. App. 401.

<sup>348</sup> Cronk v. Railroad Co., 3 S. Dak. 93.

<sup>349</sup> Denver, etc., R. R. Co. v. De Graff, 2 Col. App. 43; Caldwell v. Willey, 16 Col. 169; Hockaday v. Goodwin, 1 Col. App. 90.

<sup>350</sup> People v. Swasey, 6 Utah, 93; Hopkins v. Ogden City, 5 id. 390; Burden v. Crop, 7 Wash. St. 198.

<sup>351</sup> Clanton v. Coward, 67 Cal. 373; Declez v. Save, 71 id. 552; Krank v. Murray, 7 Mont. 4; Montana Railway Co. v. Warren, 6 id. 275; Beck v. Beck, id. 285; Pielke v. Railroad Co., 6 Dak. 444; Halley v. Folsom, 1 N. Dak. 325; Nat. Refining Co. v. Miller, 1 S. Dak. 548; Jeansch v. Lewis, id. 609; Smith v. Railroad Co., 9 Utah, 141; Puget Sound, etc., R. R. Co. v. Ingersoll, 4 Wash. St. 675;

a trial court to set aside the verdict of a jury and grant a new trial is an exercise of discretion, not to be reviewed by an appellate court, unless it can be shown there has been an abuse of discretion, or unless there be a great preponderance of evidence against the verdict.<sup>352</sup>

§ 4704b. **Impeachment of verdict by oaths of jurors.** Affidavits of jurors will not be received to impeach their verdicts, unless authorized by statute, and only then upon the grounds, and in the manner, permitted by the statute.<sup>353</sup> Under section 657, California Code of Civil Procedure, such affidavits can only be resorted to for the purpose of impeaching the verdict, when the verdict has been determined by a resort to chance.<sup>354</sup> And an affidavit by a jurymen that the verdict was arrived at by resorting to the determination of chance, and that he was induced to assent thereto in that manner, is not conclusive upon the trial court, and where the court finds upon conflicting evidence, both oral and by affidavit, that the verdict was not a chance verdict its action will not be interfered with upon appeal.<sup>355</sup> Affidavits of jurors are not admissible to impeach their verdict on the ground that it is what is known as a "quotient verdict."<sup>356</sup>

§ 4705. **Special verdict.** A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. It shall present the conclusions of fact as established by the evidence, and not the evidence to prove them, and those conclusions of fact shall be so presented that nothing shall remain

*Williams v. Wishard*, 1 Col. App. 212; *Denver, etc., R. R. Co. v. Richards*, 2 id. 87; *Kinney v. Wood*, 10 Col. 270; *Coon v. Duckett*, 13 id. 14; *Hurd v. Railway Co.*, 8 Utah, 241; *Aultman v. Mills*, 9 Wash. St. 68; *Holman v. Land, etc., Co.*, 20 Col. 7; *Layton v. Kirken-dall*, id. 236.

<sup>352</sup> *Page v. Rodney*, 2 Wash. Ter. 461; and see *Beekman v. Hamlin*, 23 Oreg. 313; *State v. Foot You*, 24 id. 61; overruling on this point, *State v. Olds*, 19 id. 397; *Rhone v. Powell*, 20 Col. 41.

<sup>353</sup> *Murphy v. Murphy*, 1 S. Dak. 316; *Gaines v. White*, id. 434; *Cline v. Bray*, 1 Oreg. 89; *Knight v. Fisher*, 15 Col. 176; *Horner v. Abstract Co.*, 9 Utah, 193.

<sup>354</sup> *Fredericks v. Judah*, 73 Cal. 604; also, *Pawnee, etc., Improvement Co. v. Adams*, 1 Col. App. 250; *Richards v. Richards*, 20 Col. 303; *Wray v. Carpentier*, 16 id. 271; see § 4704, *ante*.

<sup>355</sup> *Dixon v. Pluns*, 101 Cal. 511.

<sup>356</sup> *Ulrick v. Trust Co.*, 2 S. Dak. 285; and see *Hunt v. Elliott*, 77 Cal. 588; compare *Dixon v. Pluns*, 98 id. 384; 35 Am. St. Rep. 180; *Village of Ponca v. Crawford*, 23 Neb. 662; 8 Am. St. Rep. 144.

to the court but to draw the conclusions of law.<sup>357</sup> In all cases other than for the recovery of money only, or specific real property, the court may direct the jury to find a special verdict in writing upon all or any of the issues, and in all cases may instruct them, if they return a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon.<sup>358</sup> Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.<sup>359</sup> When the jury are directed by the court to find a general verdict, and also to make a special finding of facts, and a general verdict is returned in favor of one party, and the findings on the special issues are in favor of the other party, the court should render judgment in accordance with the special findings, if they embrace all the issues raised in the pleadings; if not, then judgment should be rendered on the general verdict.<sup>360</sup> A special verdict must find the facts expressly and specially, and not generally or impliedly.<sup>361</sup> And the findings must be distinct,<sup>362</sup> and not equivocal. Such verdict settles the

<sup>357</sup> Cal. Code Civ. Pro., § 624. *Submission of special issues to jury.*— See *Smith v. Steamship Co.*, 99 Cal. 462; *Eisenhart v. Ordean*, 3 Col. App. 162; *Lufkins v. Collins*, 2 Idaho, 234; *Wild v. Railroad Co.*, 21 Oreg. 159; *Rohr v. Isaacs*, 8 id. 451; *Redford v. Railroad Co.*, 9 Wash. St. 55. In an action for the recovery of money only it is optional with the court to submit particular questions of fact to the jury. *Olmstead v. Dauphiny*, 104 Cal. 635; compare *Webb v. Railway Co.*, 7 Utah, 17; *Burke v. McDonald*, 2 Idaho, 646. Discretion of the court as to requiring a special verdict from the jury. *Columbia, etc., R. R. Co. v. Hawthorne*, 3 Wash. Ter. 353; *Knahtla v. Railway Co.*, 21 Oreg. 136.

<sup>358</sup> Cal. Code Civ. Pro., § 625.

<sup>359</sup> Id.; *Rolfes v. Russell*, 5 Oreg. 400; *Willey v. Morrow*, 1 Wash. Ter. 474; *Loewenberg v. Rosenthal*, 18 Oreg. 178; *Railroad Co. v. Deasey*, 3 Col. App. 196; *Cox v. Delmas*, 99 Cal. 104, 124; *Stewart v. Publishing Co.*, 1 Wash. St. 521; *Bradbury v. Improvement Co.*, 2 Idaho, 221. The special findings of a jury are inconsistent with their general verdict when the former, as a matter of law, will authorize a different judgment than that which the latter will. *Loewenberg v. Rosenthal*, 18 Oreg. 178. The findings of the jury on special issues submitted to them are ineffective for any purpose, and can not control the general verdict unless they are signed either by the jury or by their foreman. *Greenberg v. Hoff*, 80 Cal. 81.

<sup>360</sup> *McDermott v. Higby*, 23 Cal. 489.

<sup>361</sup> Cal. Code Civ. Pro., § 624; *Breeze v. Doyle*, 19 Cal. 102.

<sup>362</sup> *Woodson v. McCune*, 17 Cal. 298.

facts, and the court by its judgment pronounces the conclusions of law upon the facts so found.<sup>363</sup> And if the party dissatisfied fails to move for a new trial, the verdict is conclusive on the facts.<sup>364</sup> The court, having directed the jury to find a special verdict upon questions submitted in writing to their consideration, may withdraw any of such questions, and instruct them that they need not answer. This is purely a matter of discretion, over which the court, on appeal, will not exercise control.<sup>365</sup>

**§ 4706. Verdict by stipulation.** A stipulation that a verdict should be entered in favor of the defendant, saving to the plaintiff the same rights which he would have had in case a jury had actually rendered a verdict for the defendant, should be regarded in precisely the same light as a verdict, and be followed by the same legal results.<sup>366</sup>

**§ 4707. Verdict sustained.** When the jury found the only issues involved in the controversy, an exception to the verdict, that no verdict was found upon the issue presented by the pleadings, will not be sustained.<sup>367</sup> Where there are special and general counts in a declaration, and a demurrer is filed which affects only the special counts, and the party goes to trial upon the general issue plea to the general counts a verdict and judgment so obtained will not be set aside because the demurrer was

<sup>363</sup> Allen v. Hill, 16 Cal. 113. A special verdict is not invalidated because the jury, in addition thereto, find a general verdict embodying a conclusion of law. Smith v. Ireland, 4 Utah, 187.

<sup>364</sup> Garwood v. Simpson, 8 Cal. 101; Duff v. Fisher, 15 id. 380. An objection to the form of a special verdict must be taken before the verdict is received and recorded, otherwise the objection will not be considered on appeal. Water Co. v. Richardson, 72 Cal. 598. A judgment for the plaintiff will not be modified upon appeal so as to conform to a special verdict in his favor, if such special verdict is not supported by the complaint, and the proper judgment was entered in conformity to the cause of action stated in the complaint. Kullmann v. Greenbaum, 84 Cal. 98. Where a special verdict of a jury is adopted in an equity case by the court it takes the place of, and is equivalent to, findings by the court. And in order to show such an adoption it is not necessary that the word "adopt" should be used, but it is sufficient if it appears in any way. Morrison v. Stone, 103 Cal. 94.

<sup>365</sup> Taylor v. Ketchum, 5 Robt. 507; S. C., 35 How. Pr. 296.

<sup>366</sup> Sunol v. Hepburn, 1 Cal. 258.

<sup>367</sup> Burritt v. Gibson, 3 Cal. 396.

undisposed of.<sup>368</sup> Objection can not be taken on a writ of error that the verdict in a trial where there were several issues was that the jury found the "issue" for the plaintiff.<sup>369</sup>

**§ 4708. Declaring verdict.** When the jury have agreed upon their verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreman. The verdict must be in writing, signed by the foreman, and must be read by the clerk to the jury, and the inquiry made whether it is their verdict; if any juror disagrees, they must be sent out again; but if no disagreement be expressed, and neither party require the jury to be polled, the verdict is complete and the jury discharged from the case. Either party may require the jury to be polled, which is done by the court or clerk asking each juror if it is his verdict; if any one answer in the negative, the jury must again be sent out.<sup>370</sup> Upon the rendition of the verdict, the court orders judgment to be entered up accordingly.

**§ 4708a. Validity and construction of verdict.—generally.** As a general rule a party can not complain of an error which is practically beneficial to him. And a verdict will not be set aside for an error which is in favor of the party excepting to it.<sup>371</sup> Damages are not the prime object in an action of claim and delivery, and a general verdict for the plaintiff in such action will not be set aside because the jury did not find damages.<sup>372</sup> And irregularity of a verdict in such action in failing to find all the facts it should have done will not, under Montana statutes, invalidate the verdict.<sup>373</sup> Where the verdict states the facts fully and definitely in reference to all matters at issue between the parties, it will not be disturbed, even in an action for the recovery of money, on the ground that it does not state the amount of the recovery.<sup>374</sup> So where the answer admitted the indebtedness and amount thereof, and the only denial was that the debt was not yet due.<sup>375</sup> A verdict will not be disturbed for

<sup>368</sup> *Townsend v. Jemison*, 7 How. (U. S.) 706.

<sup>369</sup> *Laber v. Cooper*, 7 Wall. 565.

<sup>370</sup> Cal. Code Civ. Pro., § 618. If there should be any good reason, the jury should be polled. *Hindry v. Williams*, 9 Col. 371.

<sup>371</sup> *Gaines v. White*, 1 S. Dak. 434.

<sup>372</sup> *Id.*

<sup>373</sup> *Miles v. Edsall*, 7 Mont. 185.

<sup>374</sup> *Knight v. Fisher*, 15 Col. 176.

<sup>375</sup> *Joseph v. Clothing Co.*, 13 Mont. 195.



an improper remark of the trial judge, unless it is reasonably certain that the interests of the complaining party were prejudiced thereby.<sup>376</sup> A verdict can not be attacked on the ground that it is not supported by the evidence, when the record contains no specifications of the particulars in which the evidence is insufficient to sustain it.<sup>377</sup> The objection must be stated with so much of the evidence or other matter as is necessary to explain it, so that the opposite party may be fully advised of the defects in his evidence.<sup>378</sup> In determining the correctness of a verdict, weight should be given the fact that on two previous trials the finding had been the same.<sup>379</sup> That a verdict includes the value of property not declared for in the complaint is wholly immaterial where the plaintiff permits to be taken from the verdict a sum largely in excess of the value of such property.<sup>380</sup> A verdict can not be said to be against law, as contrary to the instructions of the court, because inconsistent with the facts as maintained by one party, if the jury might, upon the evidence, have decided the question of fact contrary to such party, and consistently with the instructions.<sup>381</sup> Where the court, upon hearing evidence after a jury has passed upon some of the vital issues, makes findings upon all of the issues, contrary to the verdict, such action is in effect a setting aside and vacating of the verdict, and it is the duty of the court to order a new trial by jury, and it has no power to proceed to determine the cause without a jury.<sup>382</sup> Verdicts are to have a reasonable intendment, and to receive a reasonable construction. Courts always disregard verbal inaccuracies in a general verdict, and will give judgment thereon if the facts found are sufficient, and the meaning is sufficiently clear.<sup>383</sup> It must be intended that the verdict is as comprehensive as the issues, and concludes every question of fact at issue.<sup>384</sup> A verdict is good if the title

<sup>376</sup> Hill v. Corcoran, 15 Col. 270.

<sup>377</sup> Alpers v. Schammel, 75 Cal. 590.

<sup>378</sup> Holcomb v. Keliher, 3 S. Dak. 497.

<sup>379</sup> Todd v. Demeree, 15 Col. 88.

<sup>380</sup> Perkins v. Marrs, 15 Col. 262. Reducing amount of verdict. See Patrick, etc., Co. v. Skoman, 1 Col. App. 323; Phelps v. Cogswell, 70 Cal. 201.

<sup>381</sup> Northern Railway Co. v. Jordan, 87 Cal. 23.

<sup>382</sup> Montgomery v. Sayre, 91 Cal. 206.

<sup>383</sup> Thayer v. Burger, 100 Ind. 262; Trust Co. v. Beville, id. 309; Jeansch v. Lewis, 1 S. Dak. 609.

<sup>384</sup> Hall v. Zeller, 17 Oreg. 381.



sufficiently identifies the cause in which it is rendered, and the findings of the matter submitted in issue may be ascertained and clearly understood from the wording of it.<sup>385</sup> And a party will not be heard to object to a verdict for the first time upon appeal from the judgment, if it is susceptible of a construction which may have a lawful effect relevant to the pleadings.<sup>386</sup> A special verdict upon various questions submitted to a jury should be read together, and if the findings upon a particular question be doubtful or obscure, reference may be had to the context for the purpose of ascertaining the true meaning. Findings should be so construed as to avoid a contradiction if it can be reasonably done.<sup>387</sup>

<sup>385</sup> *Kelsey v. Railway Co.*, 1 S. Dak. 80.

<sup>386</sup> *Johnson v. Visher*, 96 Cal. 310.

<sup>387</sup> *Alhambra, etc., Water Co. v. Richardson*, 72 Cal. 598.

## CHAPTER V.

### TRIAL BY REFEREES.

**§ 4709. In general.** A reference may be ordered, upon the agreement of the parties, filed with the clerk or entered in the minutes: 1. To try any or all of the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon; 2. To ascertain a fact necessary to enable the court to determine an action or proceeding.<sup>1</sup> The consent of a party to an order of reference must be in writing, or entered on the minutes.<sup>2</sup> The court has no power, when either of the parties object, to order a reference, with directions to the referee to report a judgment.<sup>3</sup> Consent may be given by oral consent, in open court, entered on the minutes.<sup>4</sup> An order of

<sup>1</sup> Cal. Code Civ. Pro., § 638; N. Y. Code, § 1011; Ohio Code, § 281; Laws of Oregon, § 218; Nevada, § 184; Wash., §§ 67, 248; Idaho, § 191; Arizona, § 184; 2 Till. & Shear. Pr. 516; and see *Faulkner v. Hendy*, 103 Cal. 20; *Von Schmidt v. Widber*, 99 Id. 515. Under Colorado practice, a reference may be ordered by the court on the stipulation of the parties to try all issues of fact as well as of law, and to report findings and judgment thereon. *Sartor v. Strassheim*, 8 Col. 185. The order of reference should state whether it was made on the agreement of parties, upon the application of one party, or on motion of the court. *Terpening v. Holton*, 9 Col. 306. An order of reference referring "the action" to a referee, "with the usual powers," based upon the consent of the defendant in open court that the case be referred to take the testimony and report, warrants the referee in making and reporting findings of fact and conclusions of law. *Illstad v. Anderson*, 2 N. Dak. 167. The reference of an action for trial and judgment does not deprive the court of power to order its dismissal for want of diligence in its prosecution before the referee. *Saville v. Frisbie* 70 Cal. 87.

<sup>2</sup> *Smith v. Polack*, 2 Cal. 92. This decision applies only to cases at common law. *Smith v. Rowe*, 4 Cal. 6.

<sup>3</sup> *Williams v. Benton*, 24 Cal. 424; *Hendy Machine Works v. Construction Co.*, 99 Id. 421; see *Sieber v. Frink*, 7 Id. 150.

<sup>4</sup> *Bates v. Vischer*, 2 Cal. 355; *People v. McGinnis* 1 Park. Cr. 387; *Keator v. Ulster Plank-Road Co.*, 7 How. Pr. 41; *Bloore v. Potter*, 9 Wend. 480; *Leaycroft v. Fowler*, 7 How. Pr. 259; see *Diddell v. Diddell*, 3 Abb. Pr. 167, and note on page 171.

court is necessary to constitute a reference, and no reference is good, as such, without an order.<sup>5</sup> In California, the whole issue in divorce cases can not be referred even by stipulation of parties. The referee, in such cases, is but a master to take testimony.<sup>6</sup> In New York, after issue joined, the parties have an absolute right to a reference of all the issues, and the proper order to be procured is an order to hear and determine the issues. It is only in cases where no issue is joined, or where some interlocutory question is involved that a reference in a divorce case simply to take and report evidence is allowable.<sup>7</sup> The order of reference can not go beyond the pleadings;<sup>8</sup> and must conform to the stipulation.<sup>9</sup> Where a cause has been referred by stipulation of the parties to take evidence and report a judgment, and the referee reports a judgment which is entered, and the court subsequently grants a new trial, it can not again refer the case to the same or another referee without a new consent.<sup>10</sup>

§ 4710. **Compulsory reference.** When the parties do not consent the court may, upon the application of either or of its own motion direct a reference in the following cases: 1. When the trial of an issue of fact requires the examination of a long account on either side; in which case the referees may be directed to hear and decide the whole issue, or report upon any specific question of fact involved therein; 2. When the taking of an account is necessary for the information of the court before judgment or for carrying a judgment or order into effect; 3. When a question of fact other than upon the pleadings arises, upon motion or otherwise, in any stage of the action; 4. When it is necessary for the information of the court in a special proceeding.<sup>11</sup> A compulsory reference of an action as involving a

<sup>5</sup> *Heslep v. San Francisco*, 4 Cal. 4; *Bonner v. McPhall*, 31 Barb. 106.

<sup>6</sup> *Baker v. Baker*, 10 Cal. 527; Cal. Civil Code, § 130.

<sup>7</sup> *Sullivan v. Sullivan*, 52 How. Pr. 453. This decision was under the former New York Code; now, by section 1012 of the present New York Code, the court may, in its discretion, grant or refuse a reference; and where a reference is granted, the court must designate the referee.

<sup>8</sup> *Branger v. Chevallier*, 9 Cal. 361.

<sup>9</sup> *Haner v. Bliss*, 7 How. Pr. 246; see, also, *Scudder v. Snow*, 29 id. 95.

<sup>10</sup> *Daverkosen v. Kelley*, 43 Cal. 477.

<sup>11</sup> Cal. Code Civ. Pro., § 639; see N. Y. Code, §§ 1013-1015; Nevada, § 185; Oregon, § 219; *McDonald v. Mortgage Co.*, 17 Oreg. 626. As

long account can be ordered where the accounts to be examined are the immediate object of the suit or the ground of the defense. They must be directly, and not incidentally and collaterally, involved.<sup>12</sup> In an action requiring the examination of a long account on the trial of an issue of fact a compulsory order of reference is proper, notwithstanding the complaint may contain allegations of fraud, which constitute ground for the arrest of the defendant, and he has been arrested thereon.<sup>13</sup> When the court has decided the principles upon which an account should be taken and settled it is the duty of the referee to take the account in pursuance of the principles thus settled; it is not competent for him to review the action of the court.<sup>14</sup> If a collateral matter not raised by the pleadings be sent to a referee under the second and third sections of the California Code of Civil Procedure, section 639, a motion for new trial is not necessary to bring the action of the referee before the court for review. The finding of the referee in such case does not take the place of a special verdict and is not binding on the court until adopted by it.<sup>15</sup>

An account is a statement of commercial or pecuniary transactions between parties, occurring at various times.<sup>16</sup> Bill of articles delivered at one time is not an account;<sup>17</sup> nor a single bill of lading containing items;<sup>18</sup> nor numerous items of damage;<sup>19</sup> nor of articles lost in an action upon an insurance policy;<sup>20</sup> nor claim for numerous articles under a single obliga-

to reference where judgment is taken upon failure to answer, see Cal. Code Civ. Pro., § 585, subd. 2; judgment for defendant upon an issue of law, *Id.*, § 636.

<sup>12</sup> *Kain v. Delano*, 11 Abb. Pr. (N. S.) 29.

<sup>13</sup> *Atocha v. Garcia*, 15 Abb. Pr. 303; S. C., 24 How. Pr. 186. Reference where the examination of a long account is involved. See *Tribon v. Strowbridge*, 7 Oreg. 156; *McDonald v. Mortgage Co.*, 17 *id.* 626; *Templeton v. Linn County*, 22 *id.* 328; *Deane v. Bridge Co.*, *id.* 169.

<sup>14</sup> *Smith v. Walker*, 38 Cal. 385; 99 Am. Dec. 415.

<sup>15</sup> *Harris v. S. F. S. R. Co.*, 41 Cal. 393.

<sup>16</sup> *Freeman v. Atlantic Mutual Ins. Co.*, 13 Abb. Pr. 124.

<sup>17</sup> *Swift v. Wells*, 2 How. Pr. 79; *Miller v. Hooker*, *id.* 171; *Stewart v. Elwele*, 3 Code R. 139; see § 618, *ante*.

<sup>18</sup> *Miller v. Hooker*, 2 How. Pr. 171.

<sup>19</sup> *Dewey v. Field*, 13 How. Pr. 437; *McCullough v. Brodie*, *id.* 346; *Sharp v. Mayor of New York*, 9 Abb. Pr. 426; S. C., 18 How. Pr. 213.

<sup>20</sup> *Freeman v. Atlantic, etc., Ins. Co.*, 13 Abb. Pr. 124; but to the contrary, see *Lewis v. Irving Fire Ins. Co.*, 15 *id.* 303.

tion.<sup>21</sup> When the taking of an account is required, it is in the discretion of the court to take the account, or to refer it to a commissioner or referee.<sup>22</sup> In an action at law, the necessity of taking a long account will not authorize the court to refer the case without the consent of parties.<sup>23</sup> It can not be ordered merely on the ground that if plaintiff recovers judgment such examination will become necessary;<sup>24</sup> though such account may be taken before main issues are tried by a jury, reserving those issues for such trial.<sup>25</sup> In an action for balance of account, the defense was payment by a promissory note; replication, that plaintiff was induced to receive the note by fraudulent representations; it was held that the case was not referable without written consent of both parties.<sup>26</sup> And in an action to dissolve a partnership, the court may order a reference for the trial of all the issues of fact relating to the condition of the partnership accounts; but it has no power, if objection is made, to order a reference of any other issue, or to direct referees to report a judgment;<sup>27</sup> and an averment in the answer that the accounts had been adjusted, and that the parties had "not taken any new contracts since," is held not sufficient to prevent a reference.<sup>28</sup> On an application for the protection of an attorney's lien, the court has power to refer the question without consent.<sup>29</sup> In actions other than those arising upon contract

<sup>21</sup> *Van Rensselaer v. Jewett*, 6 Hill, 373; 41 Am. Dec. 750.

<sup>22</sup> *Hidden v. Jordan*, 28 Cal. 301. A reference may be ordered in any equity suit, where either party alleges facts showing an accounting to be necessary. *Jones v. Gardner*, 57 Cal. 641. When the court itself takes or states the account, a refusal to order a reference for such purpose is not erroneous. *Emery v. Mason*, 75 Cal. 222.

<sup>23</sup> *Grim v. Norris*, 19 Cal. 140; 79 Am. Dec. 206.

<sup>24</sup> *Cameron v. Freeman*, 10 Abb. Pr. 333; S. C., 18 How. Pr. 310; *Keeler v. Poughkeepsie, etc., Co.*, 10 id. 11.

<sup>25</sup> *Bowman v. Sheldon*, 1 Duer, 607.

<sup>26</sup> *Seaman v. Mariani*, 1 Cal. 336.

<sup>27</sup> *Williams v. Benton* 24 Cal. 425.

<sup>28</sup> *Kennedy v. Shilton*, 1 Hilt. 546; S. C. (note to *Pratt v. Stiles*), 9 Abb. Pr. 157.

<sup>29</sup> *Ackerman v. Ackerman*, 14 Abb. Pr. 229; but compare *Fox v. Fox*, 24 How. Pr. 409; see *Hale v. Swinburne*, 17 Abb. N. C. 385. The action of the trial court in making an order of reference without the consent of the parties, in a case where such consent is required, will not be reviewed by the appellate court in the absence of an exception thereto by the party complaining of such ruling.

for the recovery of money or damages only, if no answer has been filed after default entered, if the taking of an account or the proof of any fact is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose.<sup>30</sup>

**§ 4711. Affidavit for order of reference.**

*Form No. 1133.*

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. That he is the plaintiff in the above-entitled action.

II. That said action is brought to obtain a dissolution of the copartnership heretofore and now existing between plaintiff and defendant, and for an accounting and settlement of the affairs of said copartnership [or otherwise state the nature of the action].

III. That issue was joined in said cause on the ..... day of ....., 18.., on which day the defendant filed his answer therein [state substance of the answer, if necessary, to show that the taking of an account is required].

IV. That the examination of a long account, to-wit, the accounts of the business transactions of said copartnership, is necessary to a complete determination of the rights of the parties hereto [or otherwise show that the examination of an account is necessary on either side].

[JURAT.]

[SIGNATURE.]<sup>31</sup>

**§ 4712. Order of reference.**

*Form No. 1134.*

[TITLE.]

The motion for an order of reference in this cause, coming on this day to be heard on the affidavit of A. B., and the papers, pleadings, and records in said cause, and after hearing E. F., of counsel for the plaintiff, in favor of said motion, and G. H. in opposition thereto; it appearing to the court that an examination of a long account is necessary to a complete determination of the rights of the parties:

*Shain v. Peterson*, 99 Cal. 486; and see *Hendy Machine Works v. Construction Co.*, *id.* 421.

<sup>30</sup> Cal. Code Civ. Pro., § 585, subd. 2; Nevada, § 125, subd. 2.

<sup>31</sup> Notice of motion should be given in the usual form.

It is hereby ordered that this cause be and the same is hereby referred to P. R., Esq., to examine the accounts of the copartnership heretofore existing between plaintiff and defendant, and report to the court the present state of the business of said copartnership in a summarized form, with the value of its assets and liabilities, and the accounts of each of said copartners with the said firm.

[DATE.]

[SIGNATURE.]

**§ 4713. Order of reference — practice thereon — affidavit.** The motion must be made on affidavit showing that issue is joined.<sup>32</sup> The affidavit should be made by the party himself, or show sufficient excuse for his not doing so.<sup>33</sup>

**§ 4714. Confession of judgment.** A reference with directions to the referee to take proofs concerning the confession of a judgment by the defendant, and the judgment-roll in the case, and whether the same was filed in the clerk's office, and to report the testimony, with a finding of facts and a judgment, does not submit to a reference the question as to what amount, if any, is still unpaid on the judgment.<sup>34</sup>

**§ 4715. Equity cases.** In an equity case where the trial of an issue of fact involved requires the examination of a long account the court may order a reference with directions to report upon the account, or any issue of fact involved in the account.<sup>35</sup> Not only must there be an account, but it must be a long one; four items, nor yet seven, will not constitute such an account.<sup>36</sup>

**§ 4716. Duties of referees.** It is the duty of a referee to act upon the questions committed to him, and to report whatever he is required to report by the order under which he acts.<sup>37</sup> A referee must keep as free from outside influence, or the influ-

<sup>32</sup> Jansen v. Tappen, 3 Cow. 34; see Lord v. Connor, 48 How. Pr. 95.

<sup>33</sup> Mesick v. Smith, 2 How. Pr. 7; Ross v. Beecher, id. 157; Little v. Bigelow, id. 164; Wood v. Crouner, 4 Hill, 548. Amendment of order of reference. See United States v. Church, 6 Utah, 15.

<sup>34</sup> Solomon v. Maguire, 29 Cal. 227.

<sup>35</sup> Williams v. Benton, 24 Cal. 425.

<sup>36</sup> Parker v. Snell, 10 Wend. 577; Harris v. Mead, 16 Abb. Pr. 257; Smith v. Brown, 3 How. Pr. 9.

<sup>37</sup> Hihn v. Peck, 30 Cal. 280; Quincy v. Young, 5 Daly, 44.

ence of the parties, as jurors;<sup>38</sup> and can not be a witness in a proceeding had before him.<sup>39</sup>

§ 4717. **Motion, when made.** The motion should not be made while an issue of law remains undecided, which, if decided in a particular way, would dispose of all the issues of fact. In short, it ought not to be made till the cause is ready for trial, though it may be made immediately upon joinder of issue, without waiting for a possible amendment of course by the adverse party.<sup>40</sup> And either party may have order of reference revoked or reconsidered, if such amendment be made.<sup>41</sup> It ought to be made before notice of trial.

§ 4718. **Motion opposed.** When the motion is opposed, on the ground that difficult questions of law are involved, an affidavit to that effect should be submitted, showing what questions are involved.<sup>42</sup> And questions of law must be clearly stated.<sup>43</sup> It is not a sufficient objection to a motion for reference to show that the action was in a previous trial left to a jury.<sup>44</sup> An offer to admit upon the trial the items of an account upon stipulation will defeat the motion.<sup>45</sup>

§ 4719. **Notice of motion.** In general, a notice of motion is necessary, though the court may, upon its own motion, order a reference on the hearing, without any formal motion or previous notice.<sup>46</sup>

§ 4720. **Number and residence of referees.** A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties. If the parties do not agree, the court or judge must appoint one or more referees, not exceeding three, who reside in the county in which the action or proceeding is triable, and against whom there is no legal objection, or the reference may be made to a court commissioner of the county

<sup>38</sup> *Dorlon v. Lewis*, 9 How. Pr. 1; *Yale v. Gwinits*, 4 id. 253.

<sup>39</sup> *Morss v. Morss*, 11 Barb. 510.

<sup>40</sup> *Enos v. Thomas*, 4 How. Pr. 290.

<sup>41</sup> *Beardsley v. Stover*, 7 How. Pr. 394.

<sup>42</sup> *Dewey v. Field*, 13 How. Pr. 437; *Salisbury v. Scott*, 6 Johns. 329; *Barber v. Cromwell*, 10 How. Pr. 851.

<sup>43</sup> *Salisbury v. Scott*, 6 Johns. 329; *Anon.*, 5 Cow. 423.

<sup>44</sup> *Brown v. Bradshaw*, 1 Duer, 634; 8 How. Pr. 176.

<sup>45</sup> *Mullin v. Kelly*, 3 How. Pr. 12.

<sup>46</sup> *Kelly v. Searing*, 4 Abb. Pr. 354; see *Hall v. Superior Court*, 69 Cal. 79.



where the cause is pending.<sup>47</sup> In New York, by agreement of parties, there may be five in number.<sup>48</sup> When there are three referees, or three arbitrators, all must meet, but two of them may do any act which might be done by all.<sup>49</sup>

§ 4721. **Objections to referees.** Objections to the appointment of any person as referee may be made on grounds substantially the same as challenges to jurors, for cause, except that the prohibited degree of relationship is the third instead of the fourth, and also a modification in the sixth ground.<sup>50</sup> And objections so taken must be heard and disposed of by the court; affidavits may be read, and any person examined as a witness in reference to such objections.<sup>51</sup> The fact that the referee, in proceeding supplementary to execution, was the clerk of the attaching creditor is not any considerable evidence of fraud.<sup>52</sup> The California statute, concerning references, does not require that referees should be sworn;<sup>53</sup> and in New York the oath may be waived.<sup>54</sup>

§ 4722. **Partition, action of.** The appointment of referees to try all the issues in actions for partition is governed by the general provisions of the Practice Act, and can only be made upon the agreement of all the parties.<sup>55</sup> It is erroneous for the court to order a reference for the purpose of trying all the issues in an action for partition in which there is a party whose name is unknown, and whose consent can not, therefore, be procured, and all proceedings thereon must fall.<sup>56</sup>

§ 4723. **Power of referees.** Under a reference to try issues and report a judgment, the referee can exercise all the powers

<sup>47</sup> Cal. Code Civ. Pro., § 640; Nevada, § 186.

<sup>48</sup> N. Y. Code, § 1025.

<sup>49</sup> Cal. Code Civ. Pro., § 1053; N. Y. Code, § 1026; and *Jackson v. Ives*, 22 Wend. 637.

<sup>50</sup> Cal. Code Civ. Pro., § 641, as amended by act of 1897; *Laws of Oregon*, § 22; Nevada, § 187; Idaho, § 195; Arizona, § 187.

<sup>51</sup> Cal. Code Civ. Pro., § 642; *Laws of Nevada*, § 188.

<sup>52</sup> *Adams v. Hackett*, 7 Cal. 187.

<sup>53</sup> *Sloan v. Smith*, 3 Cal. 406. In New York and Ohio it is otherwise. Ohio Code, § 288; N. Y. Code, § 1016.

<sup>54</sup> *Id.*; see *Katt v. Insurance Co.*, 26 Hun, 429; *Leyde v. Martin*, 16 Minn. 38.

<sup>55</sup> *Hastings v. Ounningham*, 35 Cal. 549.

<sup>56</sup> *Id.*; and Cal. Code Civ. Pro., § 761 *et seq.*

of a judge in relation to the trial of a cause referred to him.<sup>57</sup> But the order must be entered to confer such power fully.<sup>58</sup> A referee has power to dismiss plaintiff's complaint on his failure to appear, or to prosecute after appearance.<sup>59</sup> He may give judgment on the pleadings for plaintiff where the answer does not constitute a defense.<sup>60</sup> A court commissioner has no jurisdiction to hear a motion or to make any order in reference to the dissolution of an injunction, unless the motion is referred to him by the court.<sup>61</sup> It is the business of a referee appointed to take evidence to take all that is offered, and leave it to the court, on the hearing of the matter, to determine what is or is not competent;<sup>62</sup> and if objections taken before the referee are not renewed before the court on trial, and ruling had thereon, they are not available on appeal.<sup>63</sup> Referees have no power to allow pleadings to be amended after a case has been submitted to them.<sup>64</sup> It is directly otherwise in New York practice.<sup>65</sup> A referee can not delegate his authority, nor try a cause by deputy.<sup>66</sup>

§ 4724. **Title.** References may be ordered to examine title; *e. g.*, in an action for specific performance, but not, however, before judgment, if any other question than that of title be in dispute;<sup>67</sup> unless all other questions are frivolous.<sup>68</sup> And, after

<sup>57</sup> *Plant v. Fleming*, 20 Cal. 92; *Woodruff v. Dickle*, 31 How. Pr. 164; and see *Stimson v. Estes*, 3 Oreg. 521; *Bohlman v. Coffin*, 4 id. 313; *Thompson v. Patterson*, 54 Cal. 542; *Reever v. White*, 8 Utah, 190.

<sup>58</sup> *Bonner v. McPhail*, 31 Barb. 106.

<sup>59</sup> *Morange v. Meigs*, 54 N. Y. 207.

<sup>60</sup> *Schuyler v. Smith*, 51 N. Y. 309; 10 Am. Rep. 609.

<sup>61</sup> *Stone v. Bunker Hill Co.*, 28 Cal. 497.

<sup>62</sup> *Scott v. Williams*, 23 How. Pr. 393; 14 Abb. Pr. 70.

<sup>63</sup> *Fox v. Moyer*, 54 N. Y. 125.

<sup>64</sup> *De la Riva v. Berreyesa*, 2 Cal. 195.

<sup>65</sup> See N. Y. Code, § 1018; superseding *Billings v. Baker*, 6 Abb. Pr. 213. To determine the power of a referee, the object for which he was appointed, or the nature of the reference, must be continually kept in view. *Betts v. Letcher*, 1 S. Dak. 182.

<sup>66</sup> *Schultz v. Whitney*, 9 Abb. Pr. 71; S. C., 17 How. Pr. 471; *Heyer v. Deaves*, 2 Johns. Oh. 154.

<sup>67</sup> *Blyth v. Elmhirst*, 1 Ves. & B. 1; *Paton v. Rogers*, id. 351; *Morgan v. Shaw*, 2 Meriv. 138; *Portman v. Mill*, 2 Russ. 570; *Gordon v. Ball*, 1 Sim. & Stu. 178.

<sup>68</sup> *Wood v. Machu*, 5 Hare, 158; *Boyes v. Liddell*, 1 You. & Coll. 133; *Boehm v. Wood*, 1 Jac. & W. 419; *Withy v. Cottle*, Turn. &

some conflict of decisions, it appears to be settled that the order may contain a direction that referee may ascertain not only whether there is a good title, but when such title was perfected.<sup>69</sup>

§ 4725. **Conduct of the trial.** A trial before referees should be conducted in the same manner as before a court.<sup>70</sup> And the evidence should be embodied in a bill of exceptions, and certified by the referee.<sup>71</sup> Where a reference is had to take an account, it is within the discretion of the referee to open the case, after it is once closed, for the purpose of receiving additional testimony;<sup>72</sup> even after they have announced their decision;<sup>73</sup> though not after they have signed their report and given notice thereof to either party;<sup>74</sup> nor after it has been filed;<sup>75</sup> nor has a referee a right to bring in and file an additional or amended report.<sup>76</sup>

Where a referee admits the testimony of a witness against the objection of a defendant, such testimony can not afterwards be thrown out without first giving to the adverse party the opportunity of otherwise supplying the excluded testimony;<sup>77</sup> unless no possible evidence would be admissible upon the point;<sup>78</sup> or unless proper warning be given to the parties, at the time it is received, that it will be stricken out unless other evidence

Russ. 78. As to what order of reference may contain on examination of title, see *Bennett v. Rees*, 1 Keen, 405; *Anon.*, 3 Madd. 495; *Hyde v. Wroughton*, id. 279; *Jennings v. Hopton*, 1 id. 211, overruling *Gibson v. Clark*, 2 Ves. & B. 103; and compare *Luban v. Lightbody*, 8 Price, 606; and see *Birch v. Haynes*, 2 Meriv. 444.

<sup>69</sup> *Bennett v. Rees*, 1 Keen, 405; *Hyde v. Wroughton*, 3 Madd. 279.

<sup>70</sup> *Goodrich v. City of Marysville*, 5 Cal. 430; *Phelps v. Peabody*, 7 id. 50.

<sup>71</sup> *Goodrich v. City of Marysville*, 5 Cal. 430; *Poire v. Rocky Mt. T. Co.*, 4 West Coast Rep. 557.

<sup>72</sup> *Marzlou v. Ploche*, 10 Cal. 545; *De lafield v. De Grauw*, 9 Bosw. 1; *Duguid v. Ogilvie*, 3 E. D. Smith, 527; *Cleveland v. Hunter*, 1 Wend. 194.

<sup>73</sup> *Ayrault v. Sackett*, 17 How. Pr. 507; affirming id. 461; *Pratt v. Stiles*, 9 Abb. Pr. 154.

<sup>74</sup> *Shearman v. Justice*, 22 How. Pr. 241.

<sup>75</sup> *Niles v. Price*, 23 How. Pr. 473.

<sup>76</sup> *Headley v. Reed*, 2 Cal. 325.

<sup>77</sup> *Monson v. Cooke*, 5 Cal. 436; *Meyers v. Betts*, 5 Den. 81; *Olusman v. Merkel*, 3 Bosw. 402; *Allen v. Way*, 7 Barb. 585; *Johnson v. McIntosh*, 31 id. 267.

<sup>78</sup> *Brown v. Colle*, 1 E. D. Smith, 265.

necessary to make it valid is furnished.<sup>79</sup> Referees should observe the rules of evidence.<sup>80</sup>

§ 4726. **Findings of referee.** The report of a referee must separately state the facts found and the conclusions of law thereon.<sup>81</sup> The report must be made within twenty days after the testimony is closed.<sup>82</sup> Under the former California statute, this was held to be directory merely, and a failure to file within the time neither invalidates the report nor a judgment thereon.<sup>83</sup> In Nevada it is held that if a referee fails to make his report within the time ordered by the court, he may be removed on the application of either party, but if not removed, his authority does not expire.<sup>84</sup> In New York also it has been held that the requirement as to the time within which the report must be filed was absolute, but the section of the New York Code, section 1019, differs materially from the California Code of Civil Procedure, section 643. Under a reference upon all the issues, the report must pass upon them all,<sup>85</sup> except those upon which no evidence is offered.<sup>86</sup> Everything necessary to support the judgment must be inserted in the statement of facts;<sup>87</sup> nothing must be left to inference, though a finding of fact may be interpreted by a finding of law.<sup>88</sup>

<sup>79</sup> *Brooks v. Christopher*, 5 Duer, 216.

<sup>80</sup> *De la Riva v. Berreyesa*, 2 Cal. 195. Written documents, especially when proved by being authenticated as provided by statute, may be put in evidence at the hearing. *Baker v. Woodward*, 12 Oreg. 3. Objections to evidence. See *Illstad v. Anderson*, 2 N. Dak. 167.

<sup>81</sup> Cal. Code Civ. Pro., § 643; N. Y. Code, § 1022; *Lambert v. Smith*, 3 Cal. 408; *Roberts v. Carter*, 28 Barb. 462; S. C., 17 How. Pr. 524; *Church v. Erben*, 4 Sandf. 691; *Tilman v. Keane*, 1 Abb. Pr. (N. S.) 23; *Wright v. Sanders*, 28 How. Pr. 395; *Niles v. Battershall*, 27 id. 381; *Toll v. Whitney*, 18 id. 161. *Findings by referee.*—See *Park v. Mighell*, 3 Wash. St. 737; *Bligne v. David*, 17 Oreg. 362; *Williams v. Gallick*, 11 id. 337; *Lee Sack Sam v. Gray*, 104 Cal. 243.

<sup>82</sup> Id., § 643.

<sup>83</sup> *Keller v. Sutrick*, 22 Cal. 471.

<sup>84</sup> *Rhodes v. Williams*, 12 Nev. 21.

<sup>85</sup> *Solomon v. Maguire*, 29 Cal. 227; *Rogers v. Beard*, 20 How. Pr. 282; *Van Steenburgh v. Hoffman*, 6 id. 492.

<sup>86</sup> *Ingraham v. Gilbert*, 20 Barb. 151; *Patterson v. Graves*, 11 How. Pr. 91.

<sup>87</sup> *Tomlinson v. Mayor of New York*, 23 How. Pr. 452; *Hickok v. Bliss*, 34 Barb. 321.

<sup>88</sup> *Smith v. Devlin*, 33 N. Y. 363.

The decision of a referee stands on the same footing as that of a judge or the verdict of a jury, and, though unsatisfactory, will be conclusive on a question of fact, if there is any evidence to support it.<sup>89</sup> But not so as to conclusions of fact drawn from the pleadings alone.<sup>90</sup> When the order of reference requires the referee to try the issues and report his finding thereon, the referee may make a general finding upon the facts put in issue, stating the facts according to their legal effect.<sup>91</sup> The report of a referee and the award of an arbitrator are in all essentials the same.<sup>92</sup> The findings of facts by a referee are presumed to be based on sufficient evidence, where no statement on motion for a new trial appears in the transcript on appeal.<sup>93</sup>

§ 4727. Report of referee.

*Form No. 1135.*

[TITLE.]

To the ..... Court:

Pursuant to an order of this court in this action, made on the ..... day of ....., 18.., I, the undersigned court commissioner [or referee], report:

I. That I have been attended by the attorneys for the sev-

<sup>89</sup> Knowles v. Joost, 13 Cal. 620; Muller v. Boggs, 25 id. 179; Peck v. Vandenberg, 30 id. 11; Ball v. Loomis, 29 N. Y. 412; Kerr v. McGuire, 28 id. 446; S. C., 28 How. Pr. 27; McMahon v. Allen, 32 id. 313; Graham v. Chrystal, id. 287; Colwell v. Lawrence, 24 id. 324; Fitch v. Carpenter, 43 Barb. 40; Platt v. Thorn, 8 Bosw. 574; Morris v. Second Ave. R. R. Co., id. 679; Quirk v. Clark, 7 Mont. 231; Bartel v. Mathias, 19 Oreg. 482. When a referee reports his decision upon the whole case, his report stands as the decision of the court. When he reports the facts only, his report is a special verdict. Harris v. Railroad Co., 41 Cal. 393.

<sup>90</sup> Simmons v. Sisson, 26 N. Y. 264.

<sup>91</sup> Hihn v. Peck, 30 Cal. 280. Where an action at law is tried by a referee, who is charged to find the facts and the law, he should find the facts in detail; and where there is a counterclaim filed in the action, he should state clearly what items he allowed for and against each party. Park v. Mighell, 3 Wash. St. 737.

<sup>92</sup> Headley v. Reed, 2 Cal. 322; Tyson v. Wells, id. 122; Grayson v. Guild, 4 id. 122.

<sup>93</sup> Donahue v. Cromartie, 21 Cal. 80. Where a cause is tried before a referee having authority to hear and decide the whole issue, his findings of fact upon oral and documentary evidence are entitled to the same consideration as the verdict of a jury, or the findings of the court based upon like evidence produced in open court. Kimball v. Lyon, 19 Col. 266; and see Bartel v. Mathias, 19 Oreg. 482.

eral parties who appeared in this action [name who appeared for plaintiff and who for defendant], and I proceeded to a hearing of the matter so referred. I further report that on such hearing, the books, deeds, papers, and vouchers of the said [partnership] have been produced before me, and both parties have rendered their respective accounts, which are hereto annexed, and marked "Schedule A."

II. That I examined said ..... concerning the transactions [state what], and adjusted a mutual account between ..... and ....., making therein all just allowances, and striking a balance which shows what appears to be due from either party to the other, which said account is hereto annexed, marked "Schedule B."

III. That said ..... owes to said partnership, etc. [state facts].

IV. That the balance shown by said schedule B [state its apportionment].

[DATE.]

[SIGNATURE.] <sup>94</sup>

§ 4728. **Decree upon report.** In a suit in chancery it is perfectly competent for the judge who tried the cause, after exceptions have been filed to the report of a referee upon the facts, and the report set aside for cause shown, to take up the testimony reported by the referee, find the facts, and render a decree in the cause.<sup>95</sup>

§ 4729. **Exceptions.** The findings of the referee or commissioner may be excepted to and reviewed in like manner as if made by the court.<sup>96</sup> Exceptions must be taken during the progress of the trial to the rulings of the referee in the same manner as before a court.<sup>97</sup> Exceptions to the report must be specific, not general.<sup>98</sup> If there be no exceptions embodied in the

<sup>94</sup> In proper cases the report may take the form of a finding upon trial by the court, with modifications of the reading. See *ante*, "Trial by the Court," "Findings."

<sup>95</sup> *McHenry v. Moore*, 5 Cal. 90. Findings of fact made by a referee in an equity case may be set aside and others made by the court. *Pratsch v. Aberdeen Packing Co.*, 7 Wash. St. 348.

<sup>96</sup> Cal. Code Civ. Pro., § 645; *Porter v. Barling*, 2 Cal. 72.

<sup>97</sup> *Phelps v. Peabody*, 7 Cal. 50; *Branger v. Chevallier*, 9 id. 353; *Belmont v. Smith*, 1 Duer, 675; and see *Tacoma Grocery Co. v. Draham*, 8 Wash. St. 263; 40 Am. St. Rep. 907.

<sup>98</sup> *Newell v. Doty*, 33 N. Y. 83; *Graham v. Chrystal*, 1 Abb. Pr. (N. S.) 121; *Pearson v. Knapp*, 1 Myl. & K. 312; *Ward v. Fitzhugh*,

report showing that the referee erred in fact, and the rule of law by which he arrived at his conclusions being not disclosed, the court can not disturb the report, and an order granting a new trial will be reversed.<sup>99</sup> But if it appear that the evidence was insufficient to justify the decision, the court may grant a new trial.<sup>100</sup> When a case is referred to a referee, under the statute, to hear and determine the issues of law and of fact, and report the same to the court, and he makes his report, wherein no errors of law or of fact occur, and no exceptions are taken, the court below should not set aside the report and grant a new trial.<sup>101</sup>

§ 4730. **Setting aside report of referee—error must be apparent.** The report of the referee can not be attacked, except for error or mistake of law, apparent on its face, or by motion for new trial, upon exceptions taken at the trial, or the evidence certified.<sup>102</sup> And the party objecting must see that such testimony as he relies on is properly certified.<sup>103</sup> The *onus* is upon the party who alleges that error was committed to make it appear that such was the case.<sup>104</sup> The error complained of, whether of law or fact, must appear on the face of the award or report.<sup>105</sup> For error in the report of a referee, the same may be set aside, and a new reference ordered.<sup>106</sup>

§ 4731. **Grounds of objection.** A court can not interfere and set aside the report of a referee upon the same ground as it will proceed to set aside the verdict of a jury.<sup>107</sup> When the alleged error consists in the final conclusion of law or fact drawn from the testimony, and the evidence is certified to the court by the referee, the proper course is to move to set aside the report,

7 Sim. 42; Gompertz v. Best, 1 You. & Coll. 114; but see Woods v. Woods, 10 Sim. 197; Moore v. Langford, 6 id. 323; Oullen v. Dean of Kildare, 2 Irish Ch. 133; Stocken v. Dawson, 2 Phil. 141.

<sup>99</sup> Tyson v. Wells, 2 Cal. 122; and see Wilson v. Davis, 1 Mont. 183.

<sup>100</sup> Cappe v. Brizzolara, 19 Cal. 607.

<sup>101</sup> Grayson v. Guild, 4 Cal. 125.

<sup>102</sup> Goodrich v. City of Marysville, 5 Cal. 430.

<sup>103</sup> Id.

<sup>104</sup> Mead v. Bunn, 32 N. Y. 275.

<sup>105</sup> Tyson v. Wells, 2 Cal. 122.

<sup>106</sup> Hidden v. Jordan, 32 Cal. 397.

<sup>107</sup> McHenry v. Moore, 5 Cal. 90; Dorlon v. Lewis, 9 How. Pr. 1; Roosa v. Saugerties Turnpike Co., 12 id. 297.

and for a new trial.<sup>108</sup> If a report does not pass upon all the issues referred, it should be set aside,<sup>109</sup> and so should a report which does not find the issues of law and fact separately.<sup>110</sup>

§ 4732. **Insufficient grounds.** It is error for the court to set aside the report of a referee, upon an examination of testimony which was not properly before it.<sup>111</sup> The court will not disturb the award of an arbitrator or report of a referee unless the error complained of, whether of law or fact, appear on the face of the award or report.<sup>112</sup> The defect of a plea, though it be bad on demurrer, is not sufficient reason to set aside the report, after submission to a referee.<sup>113</sup> The decision of a referee upon a question of fact will not be set aside where the evidence is conflicting.<sup>114</sup> Where there is a large mass of contradictory evidence reported, it will be presumed that the court weighed the evidence properly in setting aside the finding of the facts by the referee.<sup>115</sup> It would be gross abuse of discretion for a court to set aside a report of a referee, correct in all its parts, without any other apparent reason than the mere volition of the judge.<sup>116</sup>

§ 4733. **Motion to set aside.** The time within which a notice of motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, depends on the character of the reference. If it be special, the report has the effect of a special verdict;<sup>117</sup> if general, it stands as the decision of the court, and judgment may be entered thereon, exceptions

<sup>108</sup> *Branger v. Chevallier*, 9 Cal. 353.

<sup>109</sup> *Pratt v. Stiles*, 9 Abb. Pr. 156; S. O., 17 How. Pr. 211.

<sup>110</sup> *Hulce v. Sherman*, 13 How. Pr. 511; *Church v. Erben*, 4 Sandf. 691.

<sup>111</sup> *Goodrich v. City of Marysville*, 5 Cal. 430.

<sup>112</sup> *Tyson v. Wells*, 2 Cal. 122.

<sup>113</sup> *Ritchie v. Davis*, 5 Cal. 453.

<sup>114</sup> *Brady v. Brown*, 20 Cal. 520; *Hummel v. Friese*, 24 Oreg. 586; *Lovejoy v. Chapman*, 23 id. 571; *Bruce v. Insurance Co.*, 24 id. 492. The findings of a referee will rarely be disturbed on appeal when there are circumstances tending to weaken the testimony of the defeated party, or to sustain the findings as made. Id.; and see *Fable v. Lindsay*, 8 Oreg. 474; *Merchants' Nat. Bank v. Pope*, 19 id. 35; *Paddock v. Balgord*, 2 S. Dak. 100; *Hannaman v. Karrick*, 9 Utah, 236.

<sup>115</sup> *McHenry v. Moore*, 5 Cal. 90.

<sup>116</sup> *Goodrich v. City of Marysville*, 5 Cal. 430.

<sup>117</sup> Cal. Code Civ. Pro., § 645.



taken and reviewed, as if action had been tried by the court;<sup>118</sup> but if it be of a collateral matter, not an issue raised by the pleadings, it does not take the place of a special verdict, nor is it binding on the court until adopted, nor is a motion for new trial necessary in order to bring it up for review.<sup>119</sup> Failure to appear and prosecute a motion to set aside the report of a referee, and for new trial, is an abandonment of the motion.<sup>120</sup>

§ 4734. **Power of court.** A court has power to set aside the report of a referee, and grant a new trial, on the ground that the evidence before the referee did not justify his decision.<sup>121</sup> But exceptions to the ruling of the referee must have been taken at the trial. If the referee reports the facts upon all the issues, but draws an erroneous conclusion of law from the facts found, the court, before a judgment is entered, may set aside the conclusions of law, and direct a proper judgment to be entered.<sup>122</sup> It is not good practice, where a referee has reported findings of facts, for the court to strike out a finding made by the referee and substitute one of its own; but if the appellant is not prejudiced by such action, it will not be sufficient ground to award a new trial.<sup>123</sup> The court will not interfere with the exercise of a sound discretion by the referee in a matter properly resting in such discretion; *e. g.*, order him to open the case of either party to receive additional testimony after the case is closed.<sup>124</sup>

<sup>118</sup> *Id.*, §§ 644, 645; *Peabody v. Phelps*, 9 Cal. 213; *Harris v. S. F. S. R. Co.*, 41 *id.* 393.

<sup>119</sup> *Id.* As to time within which notice of motion must be given to set aside report, see Cal. Code Civ. Pro., § 659.

<sup>120</sup> *Mahoney v. Wilson*, 15 Cal. 43; *Frank v. Doane*, *id.* 303; *Green v. Doane*, *id.* 304.

<sup>121</sup> See Cal. Code Civ. Pro., § 657; *Cappe v. Brizzolara*, 19 Cal. 607. Findings of fact made by a referee in an equity case may be set aside and others made by the court. *Pratsch v. Packing Co.*, 7 Wash. St. 355; see *Merchants' Nat. Bank v. Pope*, 19 Oreg. 35. Where the court sets aside the report of a referee in whole or in part, and elects to find the facts and determine the law itself, it is its duty to find the facts and conclusions of law in the same manner as it is required to do when it tries a case without the intervention of a jury. *Id.*

<sup>122</sup> *Calderwood v. Pyser*, 31 Cal. 333; *Scott v. Pilkington*, 15 Abb. Pr. 280; *Merritt v. Millard*, 10 Bosw. 309.

<sup>123</sup> *Pratalongo v. Larco*, 47 Cal. 378.

<sup>124</sup> *Dow v. Darragh*, 10 J. & Sp. (N. Y.) 80.

§ 4735. **Judgment on report — duty of court.** A reference is a substitution for a jury, and a judgment should be had on the report as upon a verdict, and a motion to set aside the report is necessary before the appellate court can be required to examine the report and set it aside.<sup>125</sup> So with the report of a referee upon conflicting testimony, which will not be set aside upon an appeal from an order refusing to grant a new trial.<sup>126</sup> If the report of a referee under the statute contain sufficient on which to base a judgment, it is the duty of the court below to enter judgment in accordance with it.<sup>127</sup> A *mandamus* lies to compel the judge of a District Court to enter judgment on the report of a referee.<sup>128</sup>

§ 4736. **Grounds for appeal.** An order overruling an exception to the report of a referee, taken on the alleged ground that the report did not find the facts as required by the order of reference, may be reviewed on an appeal from a final judgment.<sup>129</sup> When an erroneous judgment has been entered in the court below in favor of the plaintiff on the report of a referee, and the report has been erroneously set aside, and a new trial granted, from which action the plaintiff appeals, the Supreme Court will correct both errors at the same time, in a chancery case.<sup>130</sup> If the commissioner to whom a case has been referred to take an account commits an error at the threshold which unsettles the account, the court is not bound to go over the account and correct the error, but may set aside the report and again refer the case.<sup>131</sup> The Supreme Court will not review a judgment entered on the report of a referee if no objection was made to it in the court below.<sup>132</sup> So where the testimony is conflicting, the Supreme Court will not disturb the findings.<sup>133</sup> Nor will it review the findings to ascertain whether they are contrary to the evidence except on appeal from an order denying

<sup>125</sup> *Gunter v. Sanchez*, 1 Cal. 48.

<sup>126</sup> *Ritchie v. Bradshaw*, 5 Cal. 229.

<sup>127</sup> *Headley v. Reed*, 2 Cal. 322.

<sup>128</sup> *Russell v. Elliott*, 2 Cal. 246. Entry of judgment on report of referee. See *Bowie v. Borland*, 68 Cal. 233.

<sup>129</sup> *Hihn v. Peck*, 30 Cal. 280.

<sup>130</sup> *Grayson v. Guild*, 4 Cal. 125.

<sup>131</sup> *Hidden v. Jordan*, 32 Cal. 397.

<sup>132</sup> *Porter v. Barling*, 2 Cal. 72.

<sup>133</sup> *Muller v. Boggs*, 25 Cal. 179.

a new trial.<sup>134</sup> An order setting aside a report of a referee appointed to take an account is merely interlocutory, and not subject to appeal before judgment.<sup>135</sup> So of an order setting aside a finding in a divorce case, and sending the case back to the referee for further testimony.<sup>136</sup> It seems that a stay of proceedings granted on an appeal from an order of reference is proper.<sup>137</sup>

§ 4737. *May be set aside.* Judgment is entered upon the report of a referee as matter of course, and the only mode of taking advantage of it is by moving to set it aside, as on motion for a new trial.<sup>138</sup> After rendition of judgment, the court may award a new trial, and set aside the report for any reason that would be sufficient to set aside the report of any arbitrator.<sup>139</sup> The provisions of the Practice Act relating to new trials are general, and vest in courts the same power in cases tried by a referee as in other cases.<sup>140</sup> But those provisions only apply in case of the trial of an issue raised by the pleadings; as to collateral matters referred, no motion for new trial is necessary.<sup>141</sup>

<sup>134</sup> *Peck v. Vandenberg*, 30 Cal. 11.

<sup>135</sup> *Johnston v. Dopkins*, 6 Cal. 83. No appeal lies from an order setting aside the report of a referee upon an application for a writ of mandate. *Thomas v. Smith*, 1 Mont. 21.

<sup>136</sup> *Baker v. Baker*, 10 Cal. 528.

<sup>137</sup> *Smith v. Polack*, 2 Cal. 94.

<sup>138</sup> *Headley v. Reed*, 2 Cal. 322; *Sloan v. Smith*, 3 id. 406; and see *Faulkner v. Hendy*, 103 id. 20.

<sup>139</sup> *Sloan v. Smith*, 3 Cal. 406; *Headley v. Reed*, 2 id. 322.

<sup>140</sup> *Cappe v. Brizzolara*, 19 Cal. 607.

<sup>141</sup> *Harris v. S. F. S. R. Co.*, 41 Cal. 393.

## CHAPTER VI.

### EXCEPTIONS.

§ 4738. **In general.** An exception is an objection usually made during the trial of a cause, and which would not appear of record in the case unless so taken. It is always interposed upon the theory that some ruling had been made by the court which is erroneous, and to which erroneous decision or ruling the party makes an objection. Such exception is either noted by the clerk of the court or the official reporter, if there be one, or in the judge's minutes, or what is more usual, and indeed the better practice, it is briefly written out by the attorney objecting at the time and then corrected and signed by the court, and thus becomes a bill of exception, on which the party may appeal to the Supreme Court without further assignment of errors.<sup>1</sup> An exception to secure a reversal of the decision must go to some vital point, something material; not to a mere slight or trifling error. It is not every error which will be reviewed by an appellate court. The exception should state the point with clearness, so that there can be no question in the higher courts relative to what the question is. No particular form is necessary to be adopted. Any language written even in a very informal manner, if it points out the alleged error with clearness, is good. No specific rule can be laid down to govern each case, but one thing should always be the rule: an objection should not be interposed at random with the hope merely of saving a point not then in sight. An exception is taken at the trial to a decision upon a matter of law, whether such trial be by jury, court, or referees, and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time, from the calling of the action for trial to the rendering of the verdict or decision.<sup>2</sup> The verdict of the jury, the final decision in an action or proceeding, an interlocutory order or decision finally determining the rights

<sup>1</sup> See Cal. Code Civ. Pro., § 646.

<sup>2</sup> Quivey v. Gambert, 32 Cal. 304.

of the parties, or some of them, an order or decision from which an appeal may be taken, an order sustaining or overruling a demurrer, allowing or refusing an amendment to a pleading, striking out a pleading or portion thereof, refusing a continuance, an order made upon *ex parte* application, and an order or decision made in the absence of a party, are deemed to have been excepted to.<sup>3</sup> The sole object of a bill of exceptions is to make a record of the special action of the court of what is not record by the general law.<sup>4</sup> And it is not necessary to embody therein any matter of record.<sup>5</sup> But documents and affidavits, to be reviewed by the appellate court, must be embodied in a bill of exceptions or record.<sup>6</sup> So of affidavits as to the incompetency of a juror.<sup>7</sup>

Where the record on appeal did not contain the whole judgment-roll, and the absent portions were not presented in a bill of exceptions or statement on appeal, no questions arising on matters contained in such absent portions can be made on appeal.<sup>8</sup> But where the bill of exceptions appears upon its face to have been regularly taken, the court can not presume against the record.<sup>9</sup> Nor will it sustain mere technical exceptions taken in the course of the trial, where the judgment seems right on the merits, unless compelled by law so to do.<sup>10</sup> If there is a technical variance between the evidence and finding of facts and the pleading, and no objection is made on that ground in the court below, but the objection is taken for the first time in the appellate court, the judgment will not be reversed by reason

<sup>3</sup> Cal. Code Civ. Pro., § 647; see *Ganceart v. Henry*, 98 Cal. 283; *Davis v. Water Co.*, id. 415, 417.

<sup>4</sup> *Parsons v. Davis*, 3 Ind. 425.

<sup>5</sup> *Johnson v. Sepulveda*, 5 Ind. 149; *Hall v. Linn*, 8 Col. 264; *Atchison, etc., R. R. Co. v. Nicholls*, 8 id. 188. Under Colorado practice, all matters *dehors* the record proper must be preserved by bill of exceptions, and this is true in equitable as well as legal actions. *Putnam v. Sea*, 8 Col. 298; *Mining Co. v. Kirtley*, id. 108; *Bergundthal v. Balley*, 15 id. 257; *Brink v. Posey*, 11 id. 521; *Hammond v. Bovee*, 4 Col. App. 269. But what belongs to the record proper and is contained therein can not be contradicted, qualified or varied, by anything contained in a bill of exceptions. *Kirkpatrick v. Wheeler*, 8 Col. App. 414.

<sup>6</sup> *Gates v. Buckingham*, 4 Cal. 286.

<sup>7</sup> *People v. Stonecipher*, 6 Cal. 411.

<sup>8</sup> *Hastings v. Cunningham*, 35 Cal. 549.

<sup>9</sup> *United States v. Hodge*, 6 How. (U. S.) 279.

<sup>10</sup> *English v. Johnson*, 17 Cal. 107; 76 Am. Dec. 574.

of such variance.<sup>11</sup> So, likewise, on the ground of variance between pleadings and proof, or of admission of evidence not within the issue,<sup>12</sup> or in respect of a defect of the evidence produced,<sup>13</sup> or of defects in the pleadings themselves,<sup>14</sup> or of an erroneous admission or assumption of the existence of matters not proved in fact.<sup>15</sup> Where the transcript contained, together with the judgment-roll, a copy of an order, certified to by the clerk, sustaining a demurrer to a replication, and there was no statement or bill of exceptions, it was held that the appellate court could not review the action of the court below upon the demurrer.<sup>16</sup> A party may take his bill of exceptions to the admission or exclusion of testimony, or to the rulings of the judge on points of law, and it shall not be necessary to embody in such bill anything more than sufficient facts to show the point and pertinency of the exception taken; the presiding judge shall sign the same, as the truth of the case may be, which bill shall then become a part of the record; and it shall only be necessary to bring to the Supreme Court a transcript of the pleadings and the judgment, and the bill or bills of exception so taken. A bill of exceptions must be reduced to writing, and settled by the judge within the time prescribed by the statute.<sup>17</sup>

The Supreme Court notices only the errors committed against the appellant, not those committed against the successful party.<sup>18</sup> Exceptions taken by the prevailing party are not available to his adversary, unless there be a cross-appeal.<sup>19</sup> Where the respondent takes no appeal — at least, where he files no transcript and assigns no errors — the judgment will not be reversed at his instance.<sup>20</sup> It has been the practice of the Supreme Court to

<sup>11</sup> *Dickman v. Norris*, 36 Cal. 94; *McDermott v. Grimm*, 4 Col. App. 39.

<sup>12</sup> *Com. Bank of Rochester v. Shuart*, 46 Barb. 372; *Allen v. Merc. Mut. Ins. Co.*, *id.* 642.

<sup>13</sup> *Colwell v. Lawrence*, 24 How. Pr. 324.

<sup>14</sup> *Simmons v. Sisson*, 26 N. Y. 264; *Ashley v. Marshall*, 29 *id.* 494.

<sup>15</sup> *People v. Third Ave. R. R. Co.*, 30 How. Pr. 121; *Paige v. Fazackerly*, 36 Barb. 392; *McDonald v. Christie*, 42 *id.* 36.

<sup>16</sup> *Bostwick v. McCorkle*, 22 Cal. 669.

<sup>17</sup> Cal. Code Civ. Pro., § 650. Exceptions must be taken and preserved in substantial compliance with the statute. *Randal v. Greenhood*, 3 Mont. 506; *Blackwell v. McLean*, 9 Wash. St. 301; *German Nat. Bank v. Elwood*, 16 Col. 244.

<sup>18</sup> *Frank v. Doane*, 15 Cal. 304.

<sup>19</sup> *Beach v. Cooke*, 28 N. Y. 508; 86 Am. Dec. 260; *Dougherty v. Howarle*, 47 Cal. 13.

<sup>20</sup> *Travers v. Crane*, 15 Cal. 12.

examine the case only upon the errors assigned by the appellant, and not to look into the exceptions taken by respondent.<sup>21</sup> The party alleging error on appeal must make it affirmatively appear,<sup>22</sup> as the court will not consider on appeal rulings to which no exception was taken in the court below.<sup>23</sup> If parties choose to submit to rulings without taking exceptions, they can not afterwards question them here.<sup>24</sup> And the exception when taken must be specific, and must point out the exact nature and extent of the objection relied on, to be available for a review. But where the ruling is in general terms, a general exception may suffice.<sup>25</sup> A mere rescript of the testimony by question and answer, with the objections taken and the rulings thereon, will not be considered.<sup>26</sup>

§ 4739. **Error in law.** For error in law excepted to, an appeal lies without motion for a new trial.<sup>27</sup> So the granting a nonsuit on the facts is a question of law, and may be reviewed on appeal without motion for a new trial.<sup>28</sup> When errors of law are relied upon as errors on appeal, the particular errors must be pointed out by the counsel; otherwise they will be disregarded, unless they plainly appear from the transcript on appeal.<sup>29</sup> Error in law occurring at a trial may be reviewed upon

<sup>21</sup> Jackson v. Feather River Water Co., 14 Cal. 18; Poppe v. Athearn, 42 id. 607.

<sup>22</sup> Todd v. Winants, 36 Cal. 129.

<sup>23</sup> Keeran v. Griffith, 34 Cal. 581; Lightner v. Menzell, 35 id. 452.

<sup>24</sup> Frink v. Alsip, 49 Cal. 105; and see Globe Investment Co. v. Boyum, 3 N. Dak. 538.

<sup>25</sup> Sawyer v. Chambers, 44 Barb. 42; S. C., 43 id. 622; Collyer v. Collins, 17 Abb. Pr. 467.

<sup>26</sup> Caldwell v. Parks, 50 Cal. 502; see, also, People v. Getty, 49 id. 584; Cal. Code Civ. Pro., § 648. *Sufficiency of assignment of errors.*—Consult Shinnock v. Kuhn, 4 N. Mex. 159; Lamy v. Lamy, id. 43. 140; Deemer v. Falkenberg, id. 57; Watson v. Brick Co., 3 Wash. St. 283; Wolcott v. Bachman, 3 Wyo. 335; Johnson v. Farino, 23 Oreg. 514; Archbishop v. Hack, id. 536; Thompson v. Insurance Co., 21 id. 466. It is important that each specification of error be complete within itself so as to clearly present the question involved. Herbert v. Dufur, 23 id. 462; and see Bridal Veil Lumber Co. v. Johnson, 25 id. 105.

<sup>27</sup> Rice v. Gashirle, 13 Cal. 53.

<sup>28</sup> Cravens v. Dewey, 13 Cal. 42; Darst v. Rush, 14 id. 83.

<sup>29</sup> Sanchez v. McMahon, 35 Cal. 218. See as to positive waiver of objection on the ground of error of law committed at the trial, unless the exception be taken to it at the time, McCartney v. Fitz-Henry, 16 Cal. 186; Lightner v. Menzel, 35 id. 452; King v. Meyer, id. 646;

a bill of exceptions, as well as upon a motion for a new trial.<sup>30</sup> But an order striking out a statement on motion for a new trial can not be brought before the Supreme Court for review by a bill of exceptions.<sup>31</sup> On appeal by a plaintiff from an order overruling a motion for a new trial made by him on the ground of insufficiency of the evidence to justify the verdict, an exception taken by defendant on the trial to the competency of a witness who testified for plaintiff will not be considered.<sup>32</sup> The objection that the judgment is not authorized by the pleadings may be taken on an appeal from the judgment-roll alone. The fact that a motion for a new trial was made, which did not state this as one of the grounds, does not operate as a waiver of the objection.<sup>33</sup> The United States Supreme Court can notice a material and incurable defect in the pleadings and verdict, as they are represented in the record to have existed in the court below, although such defect is not noticed in the bill of exceptions, nor suggested by the counsel in argument here.<sup>34</sup> Where the court below tries the cause without a jury, the proper mode of reserving questions of law is to ask the court to decide them, and note the refusal in a bill of exceptions.<sup>35</sup> Where plaintiffs, having excepted to the ruling of the court excluding certain evidence, take in consequence of such ruling a nonsuit with leave to move to set aside, they do not waive any of their rights as to the exceptions taken. Objections to the introduction of evidence are confined on appeal to the grounds taken below.<sup>36</sup>

§ 4740. **Exceptions to evidence — admission of evidence.** A bill of exceptions which says that the paper was offered in evi-

Henry v. S. P. R. R. Co., 50 Id. 176; Barlow v. Scott, 24 N. Y. 40; Pollen v. Leroy, 10 Bosw. 38; Enos v. Eigenbrodt, 32 N. Y. 444.

<sup>30</sup> Wall v. Preston, 25 Cal. 61. When an appeal is taken on a bill of exceptions, errors of law occurring at the time may be reviewed, although no specification of the particular errors of law on which the appellant relies is contained in the bill. Shadburne v. Daly, 76 Cal. 355; Hagman v. Williams, 88 Id. 146.

<sup>31</sup> Quivey v. Gambert, 32 Cal. 304; but see Cal. Code Civ. Pro., § 651; and Lucas v. The City of Marysville, 44 Cal. 212.

<sup>32</sup> Pierce v. Jackson, 21 Cal. 636.

<sup>33</sup> Putnam v. Lamphier, 36 Cal. 151.

<sup>34</sup> Garland v. Davis, 4 How. (U. S.) 131.

<sup>35</sup> Griswold v. Sharp, 2 Cal. 17; Lucas v. San Francisco, 28 Id. 591.

<sup>36</sup> Natoma W. & M. Co. v. Clarkin, 14 Cal. 549; King v. Meyer, 85 Id. 646. When too late to raise question of variance. Brace v. Doble, 3 S. Dak. 416.



dence does not show that the paper was read in evidence.<sup>37</sup> An objection to the sufficiency of evidence should be made at the time the same is offered to be introduced, so that a party may have the opportunity of supplying the necessary evidence.<sup>38</sup> An exception must be made, or the objection is waived, and can not afterwards be raised.<sup>39</sup> Objections to the introduction of evidence must be taken on the trial below; they can not be taken for the first time in the appellate court.<sup>40</sup> Objections to a deposition can not be made unless taken when it is offered in evidence.<sup>41</sup>

§ 4741. **Documentary evidence.** An exception to the admissibility of a deed in evidence must be taken on the trial of the cause, at *nisi prius*. The point can not be considered on appeal.<sup>42</sup> A statement in a bill of exceptions that the plaintiff offered in evidence a deed to him and others, conveying the demanded premises to the parties therein named, according to their respective interests, does not show whether the deed conveyed the land to the parties as tenants in common or in severalty.<sup>43</sup>

§ 4742. **Irrelevant testimony.** If in a trial before the court, without a jury, irrelevant testimony is received, with the understanding that it is not to be considered by the court unless other testimony is afterwards introduced making it relevant, and such testimony is not afterwards introduced, the presumption will be that the court discarded the evidence in rendering judgment, and the error is without consequence.<sup>44</sup> A conditional exception to evidence, subject to a future decision, must be repeated positively after decision made.<sup>45</sup> Exception is nullified

<sup>37</sup> Page v. O'Brien, 36 Cal. 559.

<sup>38</sup> Goodale v. West, 5 Cal. 339; Mott v. Smith, 16 id. 533; Hoxie v. Allen, 38 N. Y. 175.

<sup>39</sup> Castro v. Gill, 5 Cal. 42; Letter v. Putney, 7 id. 423.

<sup>40</sup> Covillaud v. Tanner, 7 Cal. 38; Fountain v. Pettee, 38 N. Y. 184; Laber v. Cooper, 7 Wall. 565; O'Connell v. Hotel Co., 90 Cal. 515; Mora v. The People, 19 Col. 255; Story v. Black, 5 Mont. 26; Murray v. Railroad Co., 3 N. Mex. 337; Higgins v. Armstrong, 9 Cal. 38; Austin v. Andrews, 71 id. 98.

<sup>41</sup> Jones v. Love, 9 Cal. 70; Hobbs v. Duff, 43 id. 485.

<sup>42</sup> Pearson v. Snodgrass, 5 Cal. 478; Posten v. Rasette, id. 467.

<sup>43</sup> Page v. O'Brien, 36 Cal. 559.

<sup>44</sup> Jones v. Morse, 36 Cal. 205.

<sup>45</sup> Bihin v. Bihin, 17 Abb. Pr. 19.

where the defect excepted to is supplied during the trial.<sup>46</sup> A party can not, by consenting to admit evidence "subject to all legal exceptions," absolve himself from the necessity of taking exceptions to the relevancy or sufficiency thereof, and devolve the responsibility of discovering whatever objections may exist on the court below, and after fishing for a verdict, for the first time assign his objections in the Supreme Court.<sup>47</sup>

**§ 4743. Insufficiency of evidence.** The usual mode in which error in findings, on the ground of insufficiency of evidence to support them, is reached on appeal, is by making such insufficiency a ground of motion for a new trial; but it seems that under the Code the party aggrieved may either move for a new trial on that ground, or specify in a bill of exceptions in what respect the evidence did not justify the decision, and take up the evidence upon the point in question.<sup>48</sup>

**§ 4744. Proving exceptions.** If the judge in any case refuse to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the Supreme Court to prove the same.<sup>49</sup>

**§ 4745. Special exception necessary.** Where a party objects to the admission of testimony on trial, he must state the point of his objection at the time. General objections will not do.<sup>50</sup> The party should lay his finger on the point at the time of trial, otherwise the appellate court can not review it.<sup>51</sup> A party is confined to the objections raised upon the trial.<sup>52</sup> General objection is not good unless the evidence objected to be absolutely incompetent, in which case such general objection is available;<sup>53</sup> or where the testimony could not, under any possible circum

<sup>46</sup> *Oronse v. Fitch*, 14 Abb. Pr. 346; *Park Bank v. Tilton*, 15 id. 384.

<sup>47</sup> *Covilland v. Tanner*, 7 Cal. 38.

<sup>48</sup> *Jones v. Shay*, 50 Cal. 508; see Cal. Code Civ. Pro., § 648.

<sup>49</sup> As to the mode, etc., see Cal. Code Civ. Pro., § 652.

<sup>50</sup> *People v. Apple*, 7 Cal. 290; *Killer v. Kimbal*, 10 id. 267; *Martin v. Travers*, 12 id. 245; *Brewing Co. v. Mclenz*, 5 Dak. 136; *Crocker v. Carpenter*, 98 Cal. 418; *Gaber v. Glanella*, id. 527; *Harris v. Zanone*, 93 id. 59; *City of Helena v. Albertose*, 8 Mont. 499; *Farles v. Bigelow*, 7 Wash. St. 581; *Ward v. Wilms*, 16 Col. 86; *Rosina v. Trowbridge*, 20 Nev. 105; *Kleinschmidt v. Iler*, 6 Mont. 122.

<sup>51</sup> Id.; *Sneed v. Osborn*, 25 Cal. 619.

<sup>52</sup> *Waterville Mfg. Co. v. Brown*, 9 How. Pr. 27; *Smith v. Floyd*, 18 Barb. 523; see, however, *Keyes v. Devlin*, 3 E. D. Smith, 518.

<sup>53</sup> *Nightingale v. Scannell*, 18 Cal. 315.

stances, have been relevant.<sup>54</sup> So where error is alleged in the exclusion of testimony, it must clearly appear on the face of the exception that the testimony was, not that possibly it might have been, relevant.<sup>55</sup> Where a defendant's objection to the admission of testimony on the trial is general, he can not be permitted to make it special for the first time in this court.<sup>56</sup>

§ 4746. **When exception lies.** In New York, the comments of the judge upon the evidence are not subject to exception.<sup>57</sup> It is questionable whether an exception lies to an illegal question put by a juror.<sup>58</sup>

§ 4746a. **Exceptions — relative to matters of evidence — generally.** The introduction of testimony without objection under issues defectively framed is a waiver of such defects, and they will not be considered on appeal.<sup>59</sup> If the record on appeal does not contain all the evidence, an objection that the judgment is not sustained by the evidence will not be considered.<sup>60</sup> An objection to the admission of a judgment-roll in evidence, on the ground of variance between the averments of the complaint and the judgment-roll, where one named the amount of the judgment and costs *in solido* and the other stated the amounts separately, is frivolous.<sup>61</sup> In an equitable action, under Washington practice, it is not necessary for either party to take an exception to a ruling as to the materiality or competency of testimony offered in the lower court.<sup>62</sup> But it is, nevertheless, the duty of the court to exclude testimony which is wholly irrelevant to the pleadings, when objection is made.<sup>63</sup>

The conduct of an attorney, in his argument before the jury, in referring to matters not in evidence, alleged as one of the grounds of a motion for a new trial, can not be considered on appeal, where no objection was made, and no exception saved, to the statements when they were made.<sup>64</sup>

<sup>54</sup> *Dreux v. Domec*, 18 Cal. 83; *Sneed v. Osborn*, 25 id. 619.

<sup>55</sup> *Cohn v. Mulford*, 15 Cal. 50.

<sup>56</sup> *People v. Glenn*, 10 Cal. 32.

<sup>57</sup> *Nolton v. Moses*, 3 Barb. 31; *Gardner v. Barden*, 34 N. Y. 433.

<sup>58</sup> *Kelly v. Commonwealth Ins. Co. of Penn.*, 10 Bosw. 82.

<sup>59</sup> *Hogan v. Shuart*, 11 Mont. 498.

<sup>60</sup> *York v. Fortenbury*, 15 Col. 129.

<sup>61</sup> *Frevert v. Swift*, 19 Nev. 400.

<sup>62</sup> *Scully v. Book*, 5 Wash. St. 182.

<sup>63</sup> *Davis v. Hinchcliffe*, 7 Wash. St. 159; see § 4742, *ante*.

<sup>64</sup> *Higley v. Gilmer*, 3 Mont. 433.

§ 4747. **Exceptions to findings — defective findings.** Defective findings should be specially excepted to in the court below.<sup>65</sup> And the exceptions should point out wherein the defect consists.<sup>66</sup> But where judgment is rendered upon general or special findings, and a new trial is moved for upon a statement containing the evidence, no special exceptions to presumed findings or motion in the court below is necessary.<sup>67</sup>

§ 4748. **Form, time for filing.** No particular form of exception is required; but when the exception is to the verdict or decision, upon the ground of the insufficiency of the evidence to justify it, the objection must specify the particulars in which such evidence is alleged to be insufficient. The objection must be stated with so much of the evidence or other matter as is necessary to explain it, and no more. Only the substance of the reporter's notes of the evidence shall be stated. Documents on file in the action or proceeding may be copied, or the substance thereof stated, or a reference thereto, sufficient to identify them, may be made.<sup>68</sup>

§ 4749. **Want of findings.** If there be a material fact in respect to which the findings are silent, the party aggrieved may except to them by pointing out the particular defect or omission complained of, and if the court refuse to correct them, the remedy is by appeal. But if, on any material fact, the court finds contrary to or without sufficient evidence, this is ground for a new trial only.<sup>69</sup> Where the findings are contrary to or unsupported by the evidence, the only proper proceeding to correct them is a motion for a new trial, and not an exception to the findings.<sup>70</sup> In case of a want of findings, objection can not be

<sup>65</sup> *Troy v. Clarke*, 30 Cal. 419; *Green v. Clark*, 31 id. 591; *Hathaway v. Ryan*, 35 id. 190; *Logan v. Hale*, 42 id. 646; *Ogburn v. Connor*, 46 id. 353; 13 Am. Rep. 213; *McClusky v. Gerhauser*, 2 Nev. 47; *Collier v. Ervin*, 2 Mont. 335. A specification that "the court erred in finding" certain facts is not sufficiently particular. *Coglan v. Beard*, 67 Cal. 303.

<sup>66</sup> *Hidden v. Jordan*, 28 Cal. 301.

<sup>67</sup> *Steinback v. Krone*, 36 Cal. 303.

<sup>68</sup> Cal. Code Civ. Pro., § 648. As to time of filing exceptions to findings, and serving of notice, see Cal. Code Civ. Pro., §§ 649, 650, 651; see, also, *Gay v. Moss*, 34 Cal. 125.

<sup>69</sup> *Hathaway v. Ryan*, 35 Cal. 188; see *Mulcahy v. Glazier*, 51 id. 626.

<sup>70</sup> *Hidden v. Jordan*, 28 Cal. 304; *Cowing v. Rogers*, 34 id. 648; *Rice v. Inskeep*, id. 224.

taken unless a finding was asked for and the court omitted or refused the same, and exception was taken to such omission or refusal.<sup>71</sup>

**§ 4750. When necessary.** Exceptions need not be taken where the facts found do not warrant the judgment, or where they are inconsistent with the judgment.<sup>72</sup> The office of exceptions to findings is to supply the want of findings where, upon any of the issues, the facts are insufficiently found, or not found at all.<sup>73</sup> A general exception to finding of mixed questions of law and fact does not raise the question whether the fact found is sustained by the evidence.<sup>74</sup> It is not necessary to take exceptions to the findings if the appellant attacks only the conclusions of law drawn from the facts found.<sup>75</sup>

**§ 4751. Exceptions to instructions — exception must be taken.** Appellant can not avail himself of error in the court below in instructing the jury, or in modifying instructions asked, unless he excepts in the court below.<sup>76</sup> A party can not take his chances for a verdict on instructions given or refused without exceptions taken, and then, after verdict, except to the action of the court upon motion for new trial.<sup>77</sup> Exceptions must be taken at the time the decision is made, unless otherwise provided;<sup>78</sup> but the bill containing the exceptions may be presented to the judge for settlement, either at the time the decision is made, or afterwards, under section 650 of the California Code of Civil Procedure. If an exception to the charge of the court to the jury is taken after the jury have withdrawn to consider of their verdict, and before the verdict is rendered, the question of allowing or disallowing the exception rests in the discretion

<sup>71</sup> *Lucas v. San Francisco*, 28 Cal. 591; *Hidden v. Jordan*, id. 301; see *Hicklin v. McClear*, 18 Oreg. 126. Exceptions to findings under the statute of Washington, on a trial by the court, without a jury. See *Rice v. Stevens*, 9 Wash. St. 298. As to how findings of fact may be waived, see Cal. Code Civ. Pro., § 634.

<sup>72</sup> *Lucas v. San Francisco*, 28 Cal. 591.

<sup>73</sup> *Cowing v. Rogers*, 34 Cal. 648.

<sup>74</sup> *People v. Albright*, 14 Abb. Pr. 305.

<sup>75</sup> *Solomon v. Reese*, 34 Cal. 28; *Gay v. Moss*, id. 125; *Tomlinson v. Mayor of New York*, 23 How. Pr. 452; *Rogers v. Beard*, 20 id. 98.

<sup>76</sup> *Lightner v. Menzel*, 35 Cal. 452; *Sharp v. Hoffman*, 79 id. 404; *Lewis v. Dodge*, 3 Col. App. 59; *Taylor v. Buckley*, id. 79.

<sup>77</sup> *Letter v. Putney*, 7 Cal. 423.

<sup>78</sup> Cal. Code Civ. Pro., §§ 646, 647.

of the court, and whether allowed or disallowed, the Supreme Court will not interfere with the exercise of this discretion.<sup>79</sup> In *Robinson v. W. P. R. R. Co.*, 48 Cal. 425, the court say: "Exceptions to the oral charge ought to point out the specific portions excepted to, and be made at the time, in order that the judge may have an opportunity before the jury retires to correct any error he may have inadvertently fallen into in the hurry and perplexities of the trial."<sup>80</sup> If a bill of exceptions is presented for settlement more than thirty days after the judgment is rendered, it must show an extension of time as an excuse for delay, or the bill can not be considered by the appellate court, even if settled.<sup>81</sup> A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle such bill of exceptions, or if no mode is provided by law therefor, it shall be settled in such manner as the Supreme Court may by its order or rules direct.<sup>82</sup>

§ 4752. **Must be specific.** Exceptions to the charge of a court should point out the specific portions of the charge excepted to.<sup>83</sup> A general exception to a charge to the jury will not be sustained, if any part of the charge is correct.<sup>84</sup> A general exception to the whole charge will not lay ground for a review in detail. Even when taken to "each and every ruling, severally, separately, and distinctly," it was held to amount to nothing.<sup>85</sup> To an ambiguous charge, the exception must present

<sup>79</sup> *St. John v. Kidd*, 26 Cal. 265. Whether § 646, Cal. Code Civ. Pro., has changed the law in this respect, *quaere*. Compare *Mallett v. Swain*, 56 Cal. 171.

<sup>80</sup> See, also, *Brown v. Kentfield*, 50 Cal. 131; *Jacobs v. Mitchell*, 2 Col. App. 456; *Sukeforth v. Lord*, 87 Cal. 399.

<sup>81</sup> *Higgins v. Mahoney*, 50 Cal. 444.

<sup>82</sup> Cal. Code Civ. Pro., § 653; see § 5050, *post*.

<sup>83</sup> *Hicks v. Coleman*, 25 Cal. 123; 85 Am. Dec. 103; *Dale v. Purvis*, 78 Cal. 113; *Boyd v. Oddous*, 97 id. 510; *Coleman v. Gilmore*, 49 id. 340.

<sup>84</sup> *Lincoln v. Clafin*, 7 Wall. 132; *People v. Hart*, 10 Utah, 204; *People v. Berlin*, id. 39; *Black v. City of Lewiston*, 2 Idaho, 254; *Maling v. Crummy*, 7 Wash. St. 222; *Bowers v. Railroad Co.*, 4 Utah, 215; *Kearney v. Snodgrass*, 12 Oreg. 311.

<sup>85</sup> *Magee v. Badger*, 34 N. Y. 247; 90 Am. Dec. 691; *Chamberlain v. Pratt*, 33 N. Y. 47, 52.

the modification which will free it from ambiguity, or general objection will be untenable.<sup>86</sup>

<sup>86</sup> *Springstead v. Lawson*, 23 How. Pr. 302; S. C., 14 Abb. Pr. 328. The rule relative to exceptions of this kind is thus declared: 1. When any part of a charge given is sound, a general exception to the charge as a whole can not be sustained; 2. To maintain an exception to a refusal to charge an entire series of propositions, each one of the propositions must be sound; 3. An exception to such portions of a charge as are variant from the requests made by the party, not pointing out the variance, can not be sustained. *Murray v. Murray*, 6 Oreg. 17; approved, *Salmon v. Cress*, 22 id. 177. See, also, as to the proper form and manner of taking exceptions to instructions, *Woods v. Berry*, 7 Mont. 195; *Gibbs v. Wall*, 10 Col. 153; *Bell v. Shingle Co.*, 8 Wash. St. 27. Under the Washington statute (Laws 1893, p. 112, § 4), the grounds of objection to an instruction need not be stated in the exception thereto. *Sexton v. School District*, 9 Wash. St. 5. When instructions are not as full on some particular points as desired, the party objecting should ask the court to make them more specific, before he can except on that ground. *Brown v. Porter*, 7 Wash. St. 327; *McQuillan v. Seattle*, 13 id. 600. Where the giving or refusing of instructions is excepted to, all of the instructions given or refused should be contained in the record. *Renshaw v. Switzer*, 6 Mont. 464.

# PART TENTH.

## JUDGMENTS AND DECREES.

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### CHAPTER I.

#### JUDGMENT IN GENERAL.

**§ 4753. What is a judgment.** A judgment is the final determination of the rights of the parties in the action or proceeding.<sup>1</sup> Every definite sentence or decision of a court, by which the merits of a cause are determined, although it be not technically a judgment, or the proceedings are not capable of being enrolled so as to constitute what is technically called a record, is a judgment within the meaning of the law, and as such subject to the revisory jurisdiction of the appellate court.<sup>2</sup> It should distinctly express what is given or denied.<sup>3</sup> The opinion of the judge on collateral matters is no part of the judgment;<sup>4</sup> nor his reasons given in his findings.<sup>5</sup>

**§ 4754. Jurisdiction of court.** If the court has jurisdiction of the person of the defendant and the subject-matter, the judgment is good against a collateral attack, however erroneous

<sup>1</sup> Cal. Code Civ. Pro., § 577; see, also, *Martin v. Simpkins*, 20 Cal. 438.

<sup>2</sup> *Belt v. Davis*, 1 Cal. 138. A judgment becomes "rendered" at the time the court pronounces its decision. *Estate of Cook*, 77 Cal. 220; and see *McLaughlin v. Doherty*, 54 id. 519; *Young v. Wright*, 52 id. 407; *Harmon v. Cattle Co.*, 9 Mont. 248. An entry by the clerk, at the end of the trial, in the minutes of the court, of the decision of the judge, does not constitute a judgment, though it constitutes the rendition of judgment when findings are waived. When findings of fact are not waived, and are filed by the court, they constitute the rendition of judgment. *Crim v. Kessing*, 89 Cal. 478; *San Joaquin Land & Water Co. v. West*, 99 id. 345.

<sup>3</sup> 14 Vin. Abr. 612; 6 Dane Abr. 90; *Lawes Pl.* 669; *Whitaker v. Bramson*, 2 Paine, 209.

<sup>4</sup> *Ward v. The Fashion*, 1 Newb. 41.

<sup>5</sup> *Burke v. Table Mountain Water Co.*, 12 Cal. 403.



it may be.<sup>6</sup> If it appear by the record or otherwise that the court never had jurisdiction over the person of the defendant, the judgment will be pronounced a nullity, whether it comes directly or collaterally in issue, and a sale of property under it will be void also.<sup>7</sup> A party against whom a judgment has been rendered by a court of general jurisdiction will be presumed to have been made a party to the suit in some of the ways provided by law, unless the contrary appears affirmatively by the record.<sup>8</sup>

The Superior Courts in California, by virtue of their organization and common-law powers, have full authority, except when limited by the Constitution or Practice Act, to pronounce such judgment as the exigency of each case shall require.<sup>9</sup> Jurisdiction will generally be presumed in the case of superior courts; but if the want of jurisdiction appears on the face of the record of the judgment of a superior court, the judgment is void, and it may be attacked in a collateral proceeding.<sup>10</sup> The true test is, whether the omission be of the form or of the substance of the act required to be performed. If of the substance, then the judgment is a nullity; if of form, only an irregularity.<sup>11</sup> The presumption in favor of a judgment of a court of general jurisdiction is overthrown when the record of the entire case discloses a want of jurisdiction.<sup>12</sup> But this presumption does not apply to judgments of inferior courts. In such case, the facts giving jurisdiction must be shown.<sup>13</sup> The jurisdiction sufficient to sustain a record is jurisdiction over the cause, over the parties, and over the thing, when a specific thing is the subject of the judgment.<sup>14</sup> It is essential to the validity of a judgment that it be rendered by a court of competent jurisdiction at the

<sup>6</sup> *Moore v. Martin*, 38 Cal. 428, citing *Hahn v. Kelly*, 34 id. 391; 94 Am. Dec. 742.

<sup>7</sup> *McMinn v. Whelan*, 27 Cal. 313; *Whitwell v. Barbier*, 7 id. 54; *Forbes v. Hyde*, 31 id. 342; and see *Moyer v. Bucks*, 2 Ind. App. 571; 50 Am. St. Rep. 251.

<sup>8</sup> *Sharp v. Daugney*, 33 Cal. 505.

<sup>9</sup> *Stewart v. Levy*, 36 Cal. 159.

<sup>10</sup> *Forbes v. Hyde*, 31 Cal. 342; affirmed in *Hahn v. Kelly*, 34 id. 391; 94 Am. Dec. 742; *Drake v. Duvenick*, 45 Cal. 464; *Colt v. Haven*, 30 Conn. 190; 79 Am. Dec. 244; see, also, Cal. Code Civ. Pro., § 1908.

<sup>11</sup> *Hahn v. Kelly*, 34 Cal. 391.

<sup>12</sup> *Gray v. Hawes*, 8 Cal. 569.

<sup>13</sup> *Rowley v. Howard*, 23 Cal. 404; *Jolley v. Foltz*, 34 id. 328; see § 328, *ante*.

<sup>14</sup> Cal. Code Civ. Pro., § 1917.

time and place and in the form prescribed by law.<sup>15</sup> A judgment does not depend upon the clerk performing his duty in making up the judgment-roll, or in preserving the papers. If the facts necessary to give jurisdiction to the court exist, the judgment is good.<sup>16</sup>

§ 4755. **Final judgment.** The correct rule appears to be that the words "final judgment" must be understood as applying to all judgments and decrees which determine the particular cause, and that it is not requisite that such judgment should finally decide upon the rights which are litigated.<sup>17</sup> So an order setting aside a former judgment is a final judgment.<sup>18</sup> Every definite sentence or decision of a court by which the merits of the case are determined is a final judgment.<sup>19</sup> But no question must be reserved.<sup>20</sup> So a judgment dismissing a suit in which a temporary injunction had been granted is a final judgment.<sup>21</sup> A judgment by an equally divided court, affirming the judgment of the court below, is a determination as final as if rendered by a unanimous court.<sup>22</sup> The judgment or decree of a court of competent jurisdiction is not only final as to the matters actually determined, but as to every other matter which the parties might have litigated and had decided under the pleadings.<sup>23</sup> So a failure to plead a defense which the party was bound to present is a waiver by which the party is concluded.<sup>24</sup> So when a fact is necessarily found and determined, it is final and conclusive between the parties, not only when the subject-matter is the same, but when the point comes incidentally in question in regard to

<sup>15</sup> *Wicks v. Ludwig*, 9 Cal. 173.

<sup>16</sup> *Lick v. Stockdale*, 18 Cal. 219; *Sharp v. Lumley*, 34 id. 611; *Hutchinson v. Bours*, 13 id. 50; *Sieber v. Frink*, 7 Cal. 148.

<sup>17</sup> *Belt v. Davis*, 1 Cal. 138; *Cooley v. Patterson*, 52 Me. 472; *Sheldon v. Williams*, 52 Barb. 183; *Klink v. Steamer Cusetta*, 30 Ga. 504.

<sup>18</sup> *Explaining Loring v. Illsley*, 1 Cal. 28; *Belt v. Davis*, id. 135.

<sup>19</sup> *Id.*

<sup>20</sup> *Belmont v. Ponvert*, 3 Robt. 693.

<sup>21</sup> *Dowling v. Polack*, 18 Cal. 625, in favor of the defendant; *Leese v. Sherwood*, 21 id. 151. Order, as contra-distinguished from a final judgment; see *Gilman v. Contra Costa Co.*, 8 Cal. 57; *McKinley v. Tuttle*, 34 id. 35.

<sup>22</sup> *Durant v. Essex Co.*, 7 Wall. 107.

<sup>23</sup> *Phelan v. Gardner*, 43 Cal. 311; *Harris v. Harris*, 36 Barb. 83; *Clemens v. Clemens*, 37 N. Y. 59.

<sup>24</sup> *Dewey v. Peck*, 33 Iowa, 242; *Maloney v. Horan*, 49 N. Y. 115; 10 Am. Rep. 335; *Barwell v. Knight*, 51 Barb. 267.

a different matter.<sup>25</sup> Although a judgment may be final with reference to the court that pronounced it, and as such be the subject of appeal, yet it is not necessarily final with reference to the property or rights affected so long as it is subject to appeal and liable to be reversed.<sup>26</sup>

§ 4756. **Judgment must follow allegations and proofs.** The rule that judgment should be rendered in conformity with the allegations and proofs of the parties, *secundum allegata et probata*, is fundamental in the administration of justice.<sup>27</sup> The

<sup>25</sup> Gray v. Dougherty, 25 Cal. 272; Caperton v. Schmidt, 26 id. 493; Garwood v. Garwood, 29 id. 521. See, as to effect of a judgment, Cal. Code Civ. Pro., § 1908. As to what judgments are final, consult, in ejectment, Smith v. Trabue's Heirs, 9 Pet. 4; by default on promissory notes, Clements v. Berry, 11 How. (U. S.) 398; in action on contract, Whitaker v. Bramson, 2 Paine, 209. The distinction between a judgment which is final and one which is definitive explained in United States v. The Peggy, 1 Cranch, 103. As to what decrees are final, and when decrees become final, consult Jenkins v. Eldredge, 1 Woodb. & M. 61; Porter v. United States, 2 Paine, 313. The distinction between decrees which are final and those which are interlocutory discussed in Chouteau v. Rice, 1 Minn. 24; see, also, Forgay v. Conrad, 6 How. (U. S.) 201; Perkins v. Fourniquet, id. 206; Pulliam v. Christian, id. 209; De Armas' Heirs v. United States, id. 103.

<sup>26</sup> Hills v. Sherwood, 33 Cal. 474. *Final judgment.*—There can be but one final judgment in an action, and that is one which ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy. Stockton Harvester Works v. Insurance Co., 98 Cal. 559. Judgment *pro forma*, finality of. See Adams v. Smith, 6 Dak. 94. Finality of judgment, ancillary provisions. Sharon v. Sharon, 79 Cal. 633. The fact of a reference being had after judgment does not of itself determine that the judgment is not final. And if the reference be only for the purpose of executing the judgment after all the rights of the parties have been determined, then the judgment is final. Arnold v. Sinclair, 11 Mont. 556. Final decree ordering restitution, See Sprague v. Locke, 1 Col. App. 171. A judgment directing an accounting and not establishing any certain indebtedness is interlocutory and not final. Clarke v. Baird, 98 Cal. 642. The interlocutory decree known to the old equity practice is not conclusive, like an interlocutory decree in partition, but may be modified by the final decree. Thompson v. White, 76 Cal. 381. An order overruling a demurrer with leave to amend is not a final judgment. Bode v. Investment Co., 1 N. Dak. 121.

<sup>27</sup> Green v. Covilland, 10 Cal. 332; Tomlinson v. Monroe, 41 id. 96; Christian College v. Hurdley, 49 id. 349; Bender v. Bender, 14 Oreg. 353; Woodward v. Navigation Co., 18 id. 299; Rankin v. Newman, 107 Cal. 602.

relief granted to the plaintiff, if there be no answer, can not exceed that which he shall have demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue.<sup>28</sup> So of a decree in equity.<sup>29</sup> Although the distinctions between proceedings at law and in equity have been abolished, yet it is evident that judgments at law and in equity can not be assimilated.<sup>30</sup> But affirmative relief may be granted, though not asked for in the answer.<sup>31</sup> So held in an action for the fraudulent issue of stock, and to adjust claims growing out of the frauds.<sup>32</sup>

§ 4757. **Joint and several judgment.** Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.<sup>33</sup> In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others whenever a several judgment is proper.<sup>34</sup> In an action against two defendants upon a joint contract, plaintiff may have a several judgment against one defendant who has been served, even if the other defendant has not been served; nor is it vitiated as to the defendant served, by the fact that it is in form entered up against both.<sup>35</sup> In an action against defendants jointly and not severally liable, where a portion only of the parties are served with process, the clerk can not, on the

<sup>28</sup> Cal. Code Civ. Pro., § 580; *Kelsey v. Western*, 2 N. Y. 506; *Balley v. Rider*, 10 Id. 363; *Rome Exch. Bank v. Fames*, 1 Keyes, 588; *Wright v. Delafield*, 25 N. Y. 266, reversing S. C., 23 Barb. 498; *Coleman v. Second Ave. R. R. Co.*, 38 N. Y. 201; *Gilmore v. Burch*, 7 Oreg. 374; 33 Am. Rep. 710; see, also, § 332, *ante*. A judgment for damages in excess of the amount prayed for is erroneous. *Burke v. Koch*, 75 Cal. 356.

<sup>29</sup> *Boone v. Chiles*, 10 Pet. 177; *Jackson v. Ashton*, 11 Id. 229.

<sup>30</sup> *Butler v. Lee*, 3 Keyes, 76; 33 How. Pr. 251; *Towle v. Jones*, 1 Robt. 87; *Mann v. Fairchild*, 2 Keyes, 106.

<sup>31</sup> Cal. Code Civ. Pro., § 666.

<sup>32</sup> N. Y. & N. H. R. R. Co. v. Schuyler, 34 N. Y. 30.

<sup>33</sup> Cal. Code Civ. Pro., § 578.

<sup>34</sup> Id., § 579; see *Kelly v. Plover*, 103 Cal. 35; *Fisk v. Henarie*, 14 Oreg. 29; 15 Id. 90.

<sup>35</sup> *Kelly v. Bandini*, 50 Cal. 530; see, also, Cal. Code Civ. Pro., § 414; *Shain v. Forbes*, 82 Cal. 577; *Ah Lep v. Gong Choy*, 13 Oreg. 205; *Hamm v. Basche*, 22 Id. 518; *Conklin v. Fox*, 3 Mont. 208.

application of plaintiff, enter judgment upon default against parties served only. A judgment so entered is void.<sup>36</sup> Where the liability is joint or several, the clerk may enter default and judgment against those served, whether all are served or not.<sup>37</sup> The entry of judgment by the clerk is of course confined to actions arising upon contract for the recovery of money or damages only.<sup>38</sup> When a judgment has been recovered against one or more joint debtors, the others, who were not originally served and did not appear, may be summoned to show cause why they should not be bound by the judgment.<sup>39</sup> Where there is an appearance by both defendants, judgment should be against both.<sup>40</sup> The statute authorizing the entry of judgment against the joint property of the defendants, where two or more persons, associated in any business, transact such business under a common name, by which they are sued, and one or more, but not all the associates, were served with process, has been held unconstitutional in California.<sup>41</sup>

§ 4758. **Entering judgment.** The clerk shall keep with the records of the court a book to be called the "judgment-book," in which judgments must be entered.<sup>42</sup> It is not necessary for the clerk in entering up a judgment to insert therein recitals of his exposition of the preceding facts.<sup>43</sup> The recitals in a judgment are *prima facie* evidence only of the facts.<sup>44</sup> So the recital of the service of summons is conclusive of the fact.<sup>45</sup>

<sup>36</sup> Kelly v. Austin, 17 Cal. 564; Curry v. Roundtree, 51 id. 184; see, also, Brady v. Reynolds, 13 id. 31; People v. Frisbie, 18 id. 402.

<sup>37</sup> See Cal. Code Civ. Pro., §§ 414, 585, subd. 1.

<sup>38</sup> Id., § 585.

<sup>39</sup> Cal. Code Civ. Pro., § 414; id. 989; see, also, Sneath v. Griffith, 48 Cal. 438; Tay v. Hawley, 39 id. 93.

<sup>40</sup> Flake v. Carson, 33 Ill. 518. When, in an action at law, a joint liability is charged, judgment can not be entered separately against one of the parties. Rupe v. Lumber Ass'n, 3 N. Mex. 261.

<sup>41</sup> Tay v. Hawley, 39 Cal. 93.

<sup>42</sup> Cal. Code Civ. Pro., § 668. Where judgments are required to be entered by the clerk in a record of the court to be called the "judgment book," the entry of a judgment in a book designated as "journal of proceedings," though irregular, does not impair or invalidate the judgment, especially as between the parties to the action. Work v. Railroad Co., 11 Mont. 513; Wolf v. Townsite Co., 15 id. 49.

<sup>43</sup> Leese v. Clark, 28 Cal. 33; Green v. Swift, 50 id. 455.

<sup>44</sup> Id.; Hahn v. Kelly, 34 Cal. 391; 94 Am. Dec. 742.

<sup>45</sup> Sharp v. Lumley, 34 Cal. 611.

Where the Supreme Court reverses the judgment of a District Court, and directs the entry of final judgment, such judgment can be entered by the clerk of the District Court in vacation.<sup>46</sup> So an action tried by the court without a jury may be entered in vacation.<sup>47</sup> A judgment is not a nullity because entered before exceptions to the findings are overruled and additional findings filed.<sup>48</sup> When a demurrer to the complaint is sustained, and the plaintiff's application to amend his complaint is denied, it is the duty of the clerk, without any further direction, to enter the appropriate judgment.<sup>49</sup> A judgment may be amended *nunc pro tunc*, either before or after the term has expired.<sup>50</sup> Where after the death of the appellants the appellate court, not being aware of the death, render a judgment of affirmance, upon a subsequent suggestion of the fact the judgment will be vacated, and a judgment of affirmance rendered, as of a day previous to the death, *nunc pro tunc*.<sup>51</sup> Clerical errors and misprisions may be corrected *nunc pro tunc*.<sup>52</sup> The judgment against an administrator, though in the form of a common money judgment by default, is valid, its only effect being to establish the validity of the claim.<sup>53</sup> A court may at any time render or amend a judgment *nunc pro tunc* when the record discloses that the entry on the minutes does not correctly give what was the judgment of the court.<sup>54</sup> But an alteration of a judgment by the court without notice, so as to include a party not served with process, if not void, is voidable at the election of the party.<sup>55</sup> The court may amend the judgment by inserting a clause showing who are personally liable for the debt.<sup>56</sup> The rule that a court has no

<sup>46</sup> *McMillan v. Richards*, 12 Cal. 467.

<sup>47</sup> *People v. Jones*, 20 Cal. 50; Cal. Code Civ. Pro., § 78. As to acts necessary, see *Casement v. Ringgold*, 28 Cal. 335.

<sup>48</sup> *Haley v. Amestoy*, 44 Cal. 135.

<sup>49</sup> *Gallardo v. Reed*, 49 Cal. 346.

<sup>50</sup> *Morrison v. Dapman*, 3 Cal. 255; *Swain v. Naglee*, 19 id. 127; *Branger v. Chevalier*, 9 id. 172; *Hegeler v. Henckell*, 27 id. 491; *Mountain v. Rowland*, 30 Ga. 929.

<sup>51</sup> *Black v. Shaw*, 20 Cal. 68; see Cal. Code Civ. Pro., § 669, which provides that if a party die after verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon.

<sup>52</sup> *Hegeler v. Henckell*, 27 Cal. 491; *Egan v. Egan*, 90 id. 15; see *De Castro v. Richardson*, 25 id. 49.

<sup>53</sup> *Chase v. Swain*, 9 Cal. 130.

<sup>54</sup> *Morrison v. Dapman*, 3 Cal. 255.

<sup>55</sup> *Chester v. Miller*, 13 Cal. 561; *Womack v. Sanford*, 37 Ala. 445.

<sup>56</sup> *Leviston v. Swan*, 33 Cal. 480.

power over its own judgments upon the expiration of the term has no application, except to final judgments, or while the proceedings are *in fieri*.<sup>57</sup> But where a judgment is rendered, and an appeal taken to this court, the court below loses control over the judgment, and an order amending the judgment is erroneous.<sup>58</sup>

§ 4758a. **The same — continued.** After the rendition of a judgment it is the ministerial duty of the clerk to enter it,<sup>59</sup> and he can not, by neglecting to perform that duty, destroy or impair the effect of the judgment.<sup>60</sup> The judgment need not be signed by the judge or clerk. The presumption is that the judgment as entered by the clerk was authorized.<sup>61</sup> Entry of judgment may be performed at any time, even after the expiration of office of the judge rendering the decision.<sup>62</sup> A judgment of divorce rendered in favor of a party during her lifetime may be entered after her death.<sup>63</sup> Although a judgment may not be entered within the time provided by law, it is not thereby rendered void.<sup>64</sup> A court has no right to require as a condition precedent to the entry of final judgment that a part of the judgment be first paid.<sup>65</sup> Where the trial court has rendered a judgment, but the same has not been entered, whether in consequence of the neglect of the court or neglect or misprision of the clerk, an order may properly be made that the judgment rendered be entered *nunc pro tunc*, without regard to the lapse of time, where third persons are not injured thereby.<sup>66</sup> Facts found and

<sup>57</sup> *Hastings v. Cunningham*, 35 Cal. 549.

<sup>58</sup> *Bryan v. Berry*, 8 Cal. 135.

<sup>59</sup> *Estate of Cook*, 77 Cal. 220; 11 Am. St. Rep. 267; 83 Cal. 415.

<sup>60</sup> *Id.*; *In re Newman*, 75 Cal. 213; 7 Am. St. Rep. 146; *Baker v. Brickell*, 102 Cal. 620.

<sup>61</sup> Cal., etc., *R. R. Co. v. Railroad Co.*, 67 Cal. 59; *Crim v. Kessing*, 89 id. 478.

<sup>62</sup> *Id.*; and see *Franklin v. Merida*, 50 Cal. 289.

<sup>63</sup> *Estate of Cook*, 77 Cal. 220; 11 Am. St. Rep. 267; 83 Cal. 415.

<sup>64</sup> *Brown v. Porter*, 7 Wash. St. 327; *First Nat. Bank v. Wolff*, 79 Cal. 69; *Edwards v. Hellings*, 103 id. 204; and see *Bundy v. Maginess*, 76 id. 532. Failure to enter judgment until several days after a motion for a new trial is overruled constitutes no ground for error. *Voorhies v. Hennessy*, 7 Wash. St. 243.

<sup>65</sup> *People ex rel., etc., v. Graham*, 16 Col. 347.

<sup>66</sup> *Marshall v. Taylor*, 97 Cal. 422. Under Idaho Civil Code, § 603, providing that, when trial is by the court, judgment must be entered at the close of the trial, the action of the Probate Court, in such case, in entering a formal judgment for plaintiff *nunc pro tunc*



required to be stated in the judgment should be stated therein specifically, and not by reference to matter in a pleading.<sup>67</sup> The clerk must include in the judgment interest on the amount of the verdict from the time it was rendered.<sup>68</sup> In an action in *assumpsit*, a judgment to enforce a mechanic's lien can not be entered.<sup>69</sup> If judgment is entered for the amount prayed for there is no error, although the verdict specified a greater sum.<sup>70</sup> A clerical error in the entry of a judgment, where it is shown by the record, may be corrected on motion at any time;<sup>71</sup> and this may be done after an appeal and affirmance of the judgment.<sup>72</sup> A judgment entered at a former term may be amended by the trial court by inserting the plaintiff's true name, and may be entered *nunc pro tunc* as amended.<sup>73</sup> Courts have absolute power over their judgments during the term at which they were rendered, unless that jurisdiction has been lost by appellate or other proceedings.<sup>74</sup> But pending an appeal from a judgment, the court in which the judgment was entered has no power to amend or correct it.<sup>75</sup> A judgment entered as rendered, but rendered in excess of a stipulation therefor, is erroneous, and the error is one of law committed at the trial, the remedy for which is either by motion for a new trial, or by appeal,

after an appeal had been taken to the District Court, is void. *Gray v. Cedarholm*, 2 Idaho, 41.

<sup>67</sup> *Quigley v. Birdseye*, 11 Mont. 439.

<sup>68</sup> *Mill, etc., Co. v. Machine Works*, 82 Cal. 184; compare *Alpers v. Schammel*. *Id.* 184.

<sup>69</sup> *Rupe v. Lumber Ass'n*, 3 N. Mex. 261.

<sup>70</sup> *Hogan v. Shuart*, 11 Mont. 498.

<sup>71</sup> *San Joaquin, etc., Water Co. v. West*, 99 Cal. 345.

<sup>72</sup> *Dreyfuss v. Tompkins*, 67 Cal. 339; and see *Kindel v. Lithographing Co.*, 19 Col. 310.

<sup>73</sup> *Barber v. Briscoe*, 9 Mont. 341. It is held error to enter judgment in a case when, after verdict, a stay of all proceedings has been ordered if the entry was within the time in which the order is operative. *The v. Railroad Co.*, 3 S. Dak. 563. Erroneous entry of judgment before time to answer expires. *Gwillim v. First Nat. Bank*, 13 Col. 278. Premature entry of judgment. *Sylph Min., etc., Co. v. Williams*, 4 Col. App. 345. Validity of judgment entered in vacation. See *Sperling v. Calfee*, 7 Mont. 514; *Staab v. Railroad Co.*, 3 N. Mex. 349; *Schenk v. Birdseye*, 2 Idaho, 130. Judge may direct entry of judgment outside of his district. *Gould v. Elevator Co.*, 3 N. Dak. 96.

<sup>74</sup> *Pennington v. McNally*, 11 Col. 557; *De Guile v. Alexander*, 4 Col. App. 516.

<sup>75</sup> *Shay v. Chicago Clock Co.*, 111 Cal. 549.



and is not a clerical misprision, which may be corrected by the record, and the court has no power to correct it after the expiration of six months from the date of its entry.<sup>76</sup> An application for an order directing the entry of a judgment, may be made *ex parte*. Notice is not necessary, unless a stay exists, or the court or judge, for some special reason, directs that such notice be given.<sup>77</sup>

§ 4759. Judgment-roll. An answer, notwithstanding an order to strike it out, is still entitled to its place in the judgment-roll.<sup>78</sup> An affidavit upon which to base a motion to strike out an answer, and notice of such motion and affidavit of its service, constitute no part of the judgment-roll.<sup>79</sup> A bill of exceptions made during the progress of a trial should be annexed to the judgment-roll.<sup>80</sup> Until the amendment to the two hundred and third section of the Practice Act, the judgment-roll was not required to contain the order sustaining or overruling a demurrer.<sup>81</sup> An order submitting a demurrer, where it is taken under advisement, forms no part of the judgment-roll.<sup>82</sup>

§ 4760. What constitutes. Immediately after entering the judgment, the clerk must attach together and file the following papers, which shall constitute the judgment-roll: 1. In case the complaint be not answered by any defendant, the summons, with the affidavit or proof of service; the complaint, with a memorandum indorsed thereon, that the default of the defendant in not answering was entered, and a copy of the judgment; and in case where the service so made be by publication, the affidavit for publication of summons, and the order directing the publication of summons, must also be included; 2. In all other cases the pleadings, a copy of the verdict of the jury, or finding of the court, or referee, all bills of exceptions taken and filed, and a copy of any order made on demurrer, or relating

<sup>76</sup> Dyerville Mfg. Co. v. Heller, 102 Cal. 615; and see Egan v. Egan, 90 Id. 15; Knowlton v. Mackenzie, 110 Id. 183; Cosby v. Superior Ct., Id. 45.

<sup>77</sup> Gould v. Elevator Co., 3 N. Dak. 96; and see Estate of Cook, 77 Cal. 220; 11 Am. St. Rep. 267.

<sup>78</sup> Abbott v. Douglass, 28 Cal. 295.

<sup>79</sup> Dimick v. Campbell, 31 Cal. 238; see Ganesart v. Henry, 98 Id. 281.

<sup>80</sup> More v. Del Valle, 28 Cal. 170; Klauber v. Car Co., 98 Id. 109.

<sup>81</sup> Abadie v. Carrillo, 32 Cal. 172.

<sup>82</sup> Anderson v. Fisk, 36 Cal. 625.

to a change of parties, and a copy of the judgment. If there are two or more defendants in the action, and any one of them has allowed judgment to pass against him by default, the summons, with proof of its service on such defendant, must also be added to the other papers mentioned in this subdivision; and if the service on such defaulting defendant be by publication, then the affidavit for publication, and the order directing the publication of the summons in such cases must also be included.<sup>83</sup> An interlocutory judgment is properly a part of the judgment-roll.<sup>84</sup> If the clerk neglects to make up the judgment-roll, it does not vitiate the judgment nor the proceedings under it.<sup>85</sup>

<sup>83</sup> Cal. Code Civ. Pro., § 670, as amended March 12, 1895; see *The People v. Thomas*, 101 Cal. 571.

<sup>84</sup> *Packard v. Bird*, 40 Cal. 382; 16 Am. Dec. 46. Neither a bill of particulars nor instructions of the court are any part of the judgment-roll. *Paris v. Raynor*, 76 Cal. 647; so of an order appointing a guardian *ad litem* for minor defendants. *Brady v. Page*, 66 Cal. 202; of an order setting aside a default and judgment, and restoring an answer to the files. *Von Schmidt v. Von Schmidt*, 104 id. 547; or notice of the overruling of a demurrer. *Jacks v. Baldez*, 97 id. 91; or order allowing amendment to complaint, *Carter v. Paige*, 80 id. 390. The affidavit of publication of summons is part of the judgment-roll. *People v. Thomas*, 101 Cal. 571. So is the special verdict of a jury in an equity case. *Goldman v. Rogers*, 85 Cal. 574. It is only the finding of a referee upon the whole issue that must stand as the finding of the court, and form part of the judgment-roll. *Faulkner v. Hendy*, 103 Cal. 15; and see *Lee Sack Sam v. Gray*, 104 id. 243. On settlement of the accounts of an executor or administrator, the accounts and reports accompanying them, the objections or exceptions to the accounts, the findings of the court thereon, and the judgment or order settling the accounts, constitute the judgment-roll. *Miller v. Lux*, 100 Cal. 609. Constituents of judgment-roll under Montana statute. See *Blessing v. Sias*, 7 Mont. 103. If two judgments are found in the judgment-roll, the later in point of time is the only one considered. *Colton, etc., Water Co. v. Swartz*, 99 Cal. 278.

<sup>85</sup> *Sharp v. Lumley*, 34 Cal. 611; *Lick v. Stockdale*, 18 id. 219; *Sharp v. Daughney*, 33 id. 505; § 4758a, *ante*. It must be presumed, in the absence of evidence to the contrary, that the clerk, in making up the judgment-roll, regularly performed his official duty, and made it up within the proper time, including all papers then on file which should have gone into it. *Gordon v. Donahue*, 79 Cal. 501.

§ 4761. Certificate to judgment-roll.

*Form No. 1136.*

[TITLE.]

I, the undersigned, county clerk of the said county of ....., state of California, and *ex-officio* clerk of the Superior Court of the said state, in and for said ..... county, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action, and recorded in judgment-book ..... of said court, at page ..... And I further certify that the foregoing papers, hereto annexed, constitute the judgment-roll in said action.

Witness my hand and the seal of said Superior Court, this ..... day of ....., 18..

....., Clerk.

By ....., Deputy Clerk.

§ 4762. Docketing judgment. Immediately after filing a judgment-roll, the clerk shall make the proper entries of the judgment under appropriate heads in the docket kept by him.<sup>86</sup> If the judgment be for the recovery of money or damages, the amount shall be stated in the docket under the head of judgment; if the judgment be for any other relief, a memorandum of the general character of the relief granted shall be stated. The names of the defendants shall be entered in the docket in alphabetical order.<sup>87</sup> The docket is a book which the clerk shall keep in his office, with each page divided into eight columns, and headed as follows: judgment debtors; judgment creditors; judgment; time of entry; where entered in judgment-book; appeals, when taken; judgment of appellate court; satisfaction of judgment, when entered.<sup>88</sup> The docketing of a judgment imparts constructive notice of the lien of the judgment on the real estate of the judgment debtor to strangers to the judgment.<sup>89</sup> It shall be open at all times during office hours for the inspection of the public without charge.<sup>90</sup> The judgment debtor can not set up errors in docketing the judgment as destroying its lien, when the property has been sold on execution under the judgment;

<sup>86</sup> Cal. Code Civ. Pro., § 671. Ministerial duty of clerk as to entry of judgment. See *Baker v. Brickell*, 102 Cal. 621.

<sup>87</sup> Id., § 672.

<sup>88</sup> Id.

<sup>89</sup> *Page v. Rogers*, 31 Cal. 293.

<sup>90</sup> Cal. Code Civ. Pro., § 673.

if the property sold is his, the levy operated as a lien; if not, he has no right to complain.<sup>91</sup>

§ 4763. **Lien of judgment.** From the time the judgment is docketed, it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county, owned by him at the time, or which he may afterwards acquire, until the lien ceases.<sup>92</sup> The lien continues for five years, unless the enforcement of the judgment be stayed on appeal by the execution of a sufficient undertaking as provided in this Code, in which case the lien of the judgment and any lien by virtue of an attachment that has been issued and levied in the action ceases.<sup>93</sup> *Quaere:* Upon affirmance of the judgment by the Supreme Court, and *remittitur* to the Superior Court, is the lien of the judgment revived or renewed, or does it exist at all? or must the judgment creditor rely solely upon his execution and upon the appeal bond? There would seem to be no question that during the pendency of the appeal the judgment debtor may alien his real estate, and the purchasers take it discharged of the lien, inasmuch as the lien ceases upon filing the proper bond; but whether a new lien is created upon docketing the judgment of the appellate court is not clear. A lien on real estate commences to run from the docketing of the judgment, unless the judgment is stayed by an order of the court, pending a motion for new trial, or a stay bond on appeal.<sup>94</sup> In foreclosure cases, where there is a judgment *in personam*, and also a judgment enforcing a lien and directing a sale of the property, and the undertaking on appeal only stays the sale and provides for costs, the lien of the personal judgment on the judgment debtor's property in the county where it is docketed attaches at the time it is docketed, and expires at the end of two years from the time the personal judgment is docketed.<sup>95</sup> If the plaintiff does obtain a personal judgment, a decree enforcing the lien and directing a sale of the property does not become a judgment lien on the other property until after sale and deficiency docketed, and then only for the deficiency.<sup>96</sup> A transcript of the

<sup>91</sup> *Low v. Adams*, 6 Cal. 277.

<sup>92</sup> Cal. Code Civ. Pro., § 671, as amended by act of March 9, 1895.

<sup>93</sup> *Id.*; see *Riley v. Nance*, 97 Cal. 203.

<sup>94</sup> *Barrollhet v. Hathaway*, 31 Cal. 395; 89 Am. Dec. 193; *Eby v. Foster*, 61 Cal. 282.

<sup>95</sup> *Englund v. Lewis*, 25 Cal. 350.

<sup>96</sup> *Id.*; *Culver v. Rogers*, 28 Cal. 520; *Chapin v. Broder*, 16 *id.* 421.

original docket, certified by the clerk, may be filed with the recorder of any other county; and from the time of filing, the judgment shall become a lien upon all the real property of the judgment debtor not exempt from execution in such county, owned by him at the time, or which he may afterwards, and before the lien expires, acquire. The lien continues for two years unless the judgment be previously satisfied.<sup>97</sup> The fact that a lien has existed and expired in another county makes no difference. The lien commences upon filing the transcript in the recorder's office, and continues two years.<sup>98</sup>

**§ 4764. Effect of judgment lien — death of party to judgment.** If a party die after a verdict or decision upon any issue of fact, and before judgment, the court may nevertheless render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be payable in the course of administration on his estate.<sup>99</sup> The continuance of the name of a deceased plaintiff, instead of that of his executor, in a judgment rendered after the substitution, is an error of form only, and does not make the judgment void.<sup>100</sup> The death of an appellant after argument of his case on appeal does not constitute any ground for delaying a decision, or a departing from the ordinary course of procedure, except as to the entry of the judgment which may be rendered. The entry should be of a day anterior to the appellant's death.<sup>101</sup> The rule is different if the death occurs previous to the argument. In that event, further proceedings can only be had upon leave given after suggestion of the death is made.<sup>102</sup>

**§ 4765. Equitable liens.** The lien of a judgment against the holder of the legal estate is postponed in equity to an equitable right previously acquired.<sup>103</sup> Where a creditor has obtained judgment, and caused execution to be delivered to the sheriff, and the same has been returned unsatisfied for the want of

<sup>97</sup> Cal. Code Civ. Pro., § 674.

<sup>98</sup> *Downer v. Palmer*, 23 Cal. 45. As to recording etc., see Civil Code, §§ 1159, 1165, 1169, 1170.

<sup>99</sup> Cal. Code Civ. Pro., § 669.

<sup>100</sup> *Gregory v. Haynes*, 21 Cal. 443; *Stoetzell v. Fullerton*, 44 Ill. 108.

<sup>101</sup> *Black v. Shaw*, 20 Cal. 68.

<sup>102</sup> *Id.*

<sup>103</sup> *Brown v. Pierce*, 7 Wall. 205. In what cases are judgments and decrees of United States courts liens upon real estate, see *Ward v. Chamberlain*, 2 Black, 430.

property, he does not acquire any lien by a bill in equity to discover assets upon his debtor's property.<sup>104</sup> Where judgment and decrees in equity of state courts are by state laws liens upon land, decrees in admiralty of United States courts have the same character, and are equally binding.<sup>105</sup>

**§ 4766. Extension of lien.** The issuing and levying of an execution before the lien of the judgment upon which the execution issued expires will not operate to prolong the lien of the judgment beyond the time limited in section 204 of the Code.<sup>106</sup> It required express words of the statute to create the lien, and it equally requires express words to continue it beyond the time specified.<sup>107</sup>

**§ 4767. Property subject to the lien.** The lien of a judgment is purely the creature of statute; and when the statute says "property exempt from execution," it means property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the court.<sup>108</sup>

**§ 4768. Release of lien.** The payment by a judgment debtor of the judgment, after a sheriff's sale, extinguishes the lien; and the fact that he takes a transfer of the certificate and the sheriff's deed, instead of a certificate of redemption, can not divest the lien of a subsequent judgment.<sup>109</sup> The perfecting an appeal does not release the lien acquired by docketing the judgment.<sup>110</sup> But if the enforcement of the judgment be stayed on appeal by a sufficient undertaking as provided in the Code, the lien ceases.<sup>111</sup>

<sup>104</sup> Chase v. Searles, 45 N. H. 511.

<sup>105</sup> Ward v. Chamberlain, 2 Black, 430.

<sup>106</sup> Isaac v. Swift, 10 Cal. 71; 70 Am. Dec. 698.

<sup>107</sup> Id.

<sup>108</sup> Ackley v. Chamberlain, 16 Cal. 181; 76 Am. Dec. 516; Bowman v. Norton, 16 Cal. 213. As the lien of a judgment is purely statutory, neither its existence nor commencement can be proved by parol. Eby v. Foster, 61 Cal. 282. Docketing a judgment against a mortgagor, after he has conveyed his equity of redemption, creates no lien on the property. Watt v. Wright, 66 Id. 202. The lien of an unrecorded mortgage given to secure a loan is created by the mere execution and delivery of the mortgage, and takes precedence over an attachment or judgment lien obtained after its execution. Bank of Ukiah v. Savings Bank, 100 Cal. 590.

<sup>109</sup> McCarty v. Christie, 13 Cal. 79.

<sup>110</sup> Low v. Adams, 6 Cal. 277.

<sup>111</sup> Cal. Code Civ. Pro., § 671.

§ 4769. **Gold-coin judgment.** In an action on a contract or obligation in writing for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff, whether the same be by default or after verdict, may be made payable in the same kind of money or currency so received by such person.<sup>112</sup> If the contract be to pay in gold and silver coin, the judgment must not be for gold coin only.<sup>113</sup> The allegation that a contract was payable in a specified kind of money is an allegation of a material fact, and may be traversed.<sup>114</sup> A contract that if the obligation is not paid in gold coin, the debtor will pay the difference between the value of gold and currency, is not a contract of which specific performance in gold coin can be decreed.<sup>115</sup> Upon an accounting, a promise in writing by the defendant to pay the sum found due in gold coin justifies a judgment in gold coin.<sup>116</sup> In an action to recover possession of personal property, the plaintiff may recover its value in United States legal-tender notes.<sup>117</sup> One unlawfully converting property does not sustain any injury, if the jury, in an action to recover possession of the same, find its value in United States legal-tender notes.<sup>118</sup>

§ 4770. **Costs and interest in gold coin.** Where a contract is made payable in a specific kind of money, the judgment enforcing it may enforce the payment of costs and interest in the kind of money mentioned in the contract.<sup>119</sup> But it is error for

<sup>112</sup> Cal. Code Civ. Pro., § 667.

<sup>113</sup> *Burnett v. Stearns*, 33 Cal. 469.

<sup>114</sup> *Wallace v. Eldridge* (No. 2), 27 Cal. 499.

<sup>115</sup> *Lane v. Gluckauf*, 28 Cal. 289; 87 Am. Dec. 121. See, as to bill of exchange payable in gold coin, *Bank of Prince E. I. v. Trumbull*, 53 Barb. 459.

<sup>116</sup> *Carey v. P. & C. Petroleum Co.*, 33 Cal. 695; see *Kellogg v. Sweeney*, 46 N. Y. 291; 17 Am. Rep. 333; *Insurance Co. v. Thomas*, 104 Mass. 192; *Chesapeake v. Swain*, 29 Md. 506; *Watson v. Railroad Co.*, 50 Cal. 523; *Railroad Co. v. Reynolds*, *id.* 280.

<sup>117</sup> *Tarpey v. Shepherd*, 30 Cal. 180.

<sup>118</sup> *Id.*

<sup>119</sup> *Carpentier v. Atherton*, 25 Cal. 569.



the court to adjudge the costs in an action for forcible entry and detainer to be paid in gold coin.<sup>120</sup>

§ 4771. **Ejectment.** In ejectment, if the court finds the value of the use and occupation of the premises in both gold and currency, a general judgment may be rendered for the currency value.<sup>121</sup> As a matter of law, there is no possible difference in value between gold coin and legal-tender notes, nor can evidence be received to prove a difference.<sup>122</sup> Where the kind of money received by the defendant is not in issue, and he has received the same in a fiduciary capacity, or to the use of another, it is proper for the court, upon a verdict for the amount of money, to order judgment in the kind of money received by him.<sup>123</sup>

§ 4772. **Goods sold.** If the complaint avers a contract in writing by defendant, to pay for goods sold in gold coin, made before the sale, and such contract is made after suit commenced, but dated before the sale, judgment should be for gold coin.<sup>124</sup>

§ 4773. **Dismissal of action — nonsuit.** An action may be dismissed, or a judgment of nonsuit entered, in the following cases: 1. By the plaintiff himself, at any time before trial, upon the payment of costs, if a counterclaim has not been made, or affirmative relief sought by the cross-complaint or answer of defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon. 2. By either party, upon the written consent of the other. 3. By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal. 4. By the court, when upon the trial, and before the final submission of the case, the plaintiff abandons it. 5. By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. 6. By the court, when after verdict or final submission the party entitled to judgment neglects to demand and have the same entered for more than six months. The dismissal mentioned in the first two subdivisions shall be made by an entry in the clerk's register. Judgment may thereupon be

<sup>120</sup> *More v. Del Valle*, 28 Cal. 170.

<sup>121</sup> *Carpentier v. Small*, 35 Cal. 346.

<sup>122</sup> *Id.*: *Poett v. Stearns*, 31 Cal. 78.

<sup>123</sup> *Pinkerton v. Woodward*, 33 Cal. 557; 91 Am. Dec. 657.

<sup>124</sup> *Meyer v. Kohn*, 29 Cal. 278; see *Noonan v. Hood*, 49 *id.* 298.



entered accordingly.<sup>125</sup> A party can not be sent out of court merely because his facts do not entitle him to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only when upon his facts he is entitled to no relief, either at law or in equity. If, then, upon the facts stated in his complaint the plaintiff would have been entitled to relief in equity under the old system of practice, the action can not be dismissed.<sup>126</sup>

§ 4774. A dismissal of an action by a stipulation signed by both parties, which provides that each party shall pay his own costs, is such a determination of the action in favor of the defendant as will enable him to maintain an action for malicious prosecution.<sup>127</sup> Allowing an action to rest without service of summons for two years and eight months after the summons is issued is such a want of diligence as to justify the court in dismissing the action.<sup>128</sup>

§ 4775. By consent. After an action has been tried and submitted, the plaintiff has no right to dismiss it, nor has the court any authority to enter an order of dismissal, without the consent of the defendant.<sup>129</sup>

§ 4776. By the court. Courts should, of their own motion, dismiss a case based upon a consideration which contravenes public policy, whether the parties to the suit take the objection or not.<sup>130</sup> When the plaintiff closes his evidence, if the court is

<sup>125</sup> Cal. Code Civ. Pro., § 581, as amended 1895.

<sup>126</sup> *Grain v. Aldrich*, 38 Cal. 514; 99 Am. Dec. 423; *Peters v. Foss*, 20 Cal. 587; *People v. Loewy*, 29 id. 264.

<sup>127</sup> *Kinsey v. Wallace*, 36 Cal. 463.

<sup>128</sup> *Grigsby v. Napa County*, 36 Cal. 585; 95 Am. Dec. 213. Provision is now made for the dismissal of an action unless summons shall have been issued within one year, or if the summons be not served and return thereon made within three years after the commencement of the action. Cal. Code Civ. Pro., § 581, as amended 1895.

<sup>129</sup> *Heinlin v. Castro*, 22 Cal. 100. Dismissal by consent. See *Stoutenborough v. Board of Education*, 104 Cal. 664.

<sup>130</sup> *Valentine v. Stewart*, 15 Cal. 387. As to the power of court in compulsory nonsuits, see *Ringgold v. Haven*, 1 Cal. 108; *Mateer v. Brown*, id. 221; *Silsby v. Foote*, 14 How. (U. S.) 218; *Castle v. Bullard*, 23 id. 172; *Folger v. The Robert G. Shaw*, 2 Woodb. & M. 531; *Tompson v. Campbell*, Hempst. 8; *Hyde v. Barker*, Burn. (Wis.) 148; compare *Linthicum v. Remington*, 5 Cranch C. C. 546. Power of

of opinion that it would not sustain a verdict in favor of plaintiff upon the testimony, a nonsuit should be granted.<sup>131</sup> In deciding whether the plaintiff has made a sufficient case, the cross-examination as well as the examination is to be considered.<sup>132</sup> On defendant's motion for a nonsuit, the court will permit the plaintiff to supply the defect if he can do so.<sup>133</sup>

**§ 4777. By plaintiff.** Plaintiff has a right to take a nonsuit at any time before the jury retires, there being no counterclaim.<sup>134</sup> So in ejectment. Nor, under section 148 of the California Practice Act, is he bound to tender costs before the nonsuit.<sup>135</sup> But the plaintiff has not the absolute right to take a nonsuit after the case has been finally submitted, and the jury has retired; but such right does exist at any time before such final submission and retirement.<sup>136</sup> In ejectment, the plaintiff may, at any time before trial, dismiss the action as to some of the defendants, and proceed against the others alone.<sup>137</sup> If one of several defendants in ejectment answers, and the others make

court to dismiss action for want of prosecution. See *Hassey v. Homestead, etc., Ass'n*, 102 Cal. 611; *Kubli v. Hawkett*, 89 id. 638; *Saville v. Frisbie* 70 id. 87; *Kreiss v. Hotaling*, 99 id. 383; *Murray v. Gleeson*, 100 id. 511; *Donald v. Swett*, 76 id. 257; *Diggins v. Thornton*, 96 id. 417; *Fanning v. Foley*, 99 id. 336; *Knight v. Fisher*, 15 Col. 176. In Oregon, there is no special provision for dismissing a suit or action because the summons has not been served, and a proper manner of raising the question of lack of jurisdiction not appearing on the face of the complaint is by a special appearance. *Belknap v. Charlton*, 25 Oreg. 41.

<sup>131</sup> *Ensminger v. McIntire*, 23 Cal. 593; *Geary v. Simmons*, 39 id. 232.

<sup>132</sup> *Masten v. Griffing*, 33 Cal. 116.

<sup>133</sup> *Gardiner v. Schmaelzle*, 47 Cal. 588; *Abbey Homestead v. Willard*, 48 id. 617. As to nonsuit in an action for negligence, see *Watson v. S. F., etc., Co.*, 50 Cal. 523.

<sup>134</sup> *Hancock Ditch Co. v. Bradford*, 13 Cal. 637; *Currie v. South Pac. Co.*, 23 Oreg. 400.

<sup>135</sup> Cal. Code Civ. Pro., § 581, subd. 1; *Dimick v. Deringer*, 32 Cal. 488; *Stewart v. Gray*, Hempst. 94; see *Gordon v. Goodell*, 34 Ill. 429; *Folger v. The Robert G. Shaw*, 2 Woodb. & M. 531; *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46; *Tobey v. Chaffin*, 3 Sumn. 379.

<sup>136</sup> *Brown v. Harter*, 18 Cal. 76; *Sanders v. Sanders*, 24 Ind. 133; and see *Casey v. Jordan*, 68 Cal. 246; *Thompson v. Spralg*, 66 id. 350; *Hinkel v. Donohue*, 90 id. 389; *Waite v. Wingate*, 4 Wash. St. 324; *Somerville v. Johnson*, 31 id. 140.

<sup>137</sup> *Reed v. Calderwood*, 22 Cal. 464.

default, the plaintiff may, before trial, dismiss the action as to the defendant answering, and take judgment against the others.<sup>138</sup> In an action upon a joint and several bond, where all the persons who sign it are made defendants in the complaint, the plaintiff may go to trial, if he elects so to do, before all the defendants are served, and may dismiss as to some of the defendants, and take judgment against the others.<sup>139</sup> If the defendant set up a counterclaim asking for affirmative relief, the plaintiff can not, before trial, have a dismissal of his own motion.<sup>140</sup>

§ 4777a. **Dismissal of action — continued.** An action will not be dismissed on the ground that at the time it was commenced there was another action pending between the same parties for the same cause of action, if prior to the second action the former had been dismissed by stipulation of the parties.<sup>141</sup> An action is properly dismissed if the complaint therein has been stricken out by the consent of both parties.<sup>142</sup> An intervenor against whom no relief is prayed can dismiss his complaint in intervention.<sup>143</sup> The court has discretionary power to entertain and pass upon a motion made by *amici curiae* to dismiss a suit which has been pending for years, without an effort by either party to bring it to trial, and which is a cloud upon the title to land, in which the moving parties are interested, though they are not parties to the action.<sup>144</sup> The filing by the plaintiff of a motion to dismiss his action after the sustaining of a demurrer to the complaint is a waiver of any error of the court in ruling upon the demurrer.<sup>145</sup> A motion to dismiss, made by the defendant at the close of the plaintiff's case, is

<sup>138</sup> Dimick v. Deringer, 32 Cal. 488.

<sup>139</sup> People v. Evans, 29 Cal. 429; see, also, Hamm v. Rasche, 22 Oreg. 513.

<sup>140</sup> Thompson v. Spralg, 66 Cal. 350; Hinkel v. Donohue, 90 id. 389; Denver, etc., Ry. Co. v. Copley, 9 Col. 152; Robinson v. Placerville, etc., R. R. Co., 65 Cal. 263.

<sup>141</sup> Dyer v. Scahnani, 69 Cal. 637.

<sup>142</sup> Smith v. Ling, 73 Cal. 72. Dismissal for neglect to enter judgment for six months. See Gardner v. Tatum, 77 Cal. 458; Marshall v. Taylor, 97 id. 422; Rosenthal v. McMann, 93 id. 505.

<sup>143</sup> Sheldon v. Gunn, 56 Cal. 582.

<sup>144</sup> Tompkins v. Harris, 90 Cal. 201. No notice of motion is necessary before an *amicus curiae* moves to dismiss an action on the ground that it is fictitious and collusive. Haley v. Bank, 21 Nev. 127.

<sup>145</sup> Lowman v. West, 7 Wash. St. 407.

waived, unless renewed after all the evidence is in.<sup>146</sup> An action which is directed to be dismissed is not dismissed until the judgment of dismissal has been entered in the judgment-book, and an entry of dismissal made in the register of actions. Mere entry in the clerk's register does not constitute dismissal.<sup>147</sup>

§ 4778. **Dismissal, effect of.** A dismissal of an action is in effect a final judgment in favor of the defendant. It is a final decision of that action as against all claims made by it, although it may not be a final determination of the rights of the parties, as they may be presented in some other action.<sup>148</sup> If an action is improperly dismissed by the plaintiff, defendant's remedy is by appeal from the judgment, and not by motion to set it aside.<sup>149</sup>

§ 4778a. **The same — continued.** The voluntary dismissal of an action, without any agreement of the parties, or other circumstances tending to show that such dismissal was intended as a final disposition of the case, is not a bar to another action.<sup>150</sup> A dismissal of an election contest before citation is served upon the defendant, and before any appearance has been made in the action, does not operate as a *retraxit*, and is no bar to the institution of another contest.<sup>151</sup> A judgment dismissing an action because of the failure of the plaintiff, who was a nonresident of the state, to give security for costs, is not upon the merits, and only concludes the matter then directly adjudged, and is not a bar to a subsequent action, founded upon the same cause of action, by the same plaintiff, after becoming a resident of the state.<sup>152</sup> A judgment dismissing an action for want of prosecution may be set aside by the trial court upon good cause

<sup>146</sup> *Illstad v. Anderson*, 2 N. Dak. 167.

<sup>147</sup> *Page v. Page*, 77 Cal. 83; *Acock v. Halsey*, 90 id. 215; *Brady v. Times-Mirror Co.*, 106 id. 56; *Barnes v. Barnes*, 95 id. 171; *Rochut v. Gee*, 91 id. 355.

<sup>148</sup> *Leese v. Sherwood*, 21 Cal. 151; *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46; *Amls v. Smith*, 16 id. 303; *Jay v. Almy*, 1 Woodb. & M. 262; 3 Black. Com. 295; *Episcopal, etc., Society v. Episcopal Church, etc.*, 1 Pick. 371; 2 Mass. 113; *Homer v. Brown*, 16 How. (U. S.) 354; and see *Merritt v. Campbell*, 47 Cal. 542; *Crossman v. Davis*, 79 id. 603.

<sup>149</sup> *Higgins v. Mahoney*, 50 Cal. 444.

<sup>150</sup> *Parks v. Dunlap*, 86 Cal. 189; *Pierce v. Hilton*, 102 id. 276.

<sup>151</sup> *Lord v. Dunster*, 79 Cal. 477.

<sup>152</sup> *Rosenthal v. McMann*, 93 Cal. 505.

being shown therefor.<sup>153</sup> An order of court dismissing the proceedings on a motion for a new trial can not be set aside on an *ex parte* application.<sup>154</sup> Though the dismissal of an action may not be warranted on the ground stated in the judgment order, yet if the record discloses other grounds which, as a matter of law, show that the plaintiff was not entitled in any event to recover in the action, a judgment of dismissal may be upheld.<sup>155</sup>

**§ 4779. Ejectment.** In ejectment, upon disclaimer of possession or interest in the property, a judgment for the plaintiff can not be entered. When such disclaimer is relied upon, the only proper judgment is one of nonsuit.<sup>156</sup> When the evidence, and the presumption reasonably arising therefrom, tend to prove the facts in controversy, a nonsuit is improper. The case should be submitted to the jury.<sup>157</sup> A nonsuit should not be granted if there is evidence tending to prove all the material allegations of the complaint.<sup>158</sup> It will not be granted where there is some evidence tending to show prior possession.<sup>159</sup> It is error to refuse in an action of ejectment a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action.<sup>160</sup>

**§ 4780. Judgment on nonsuit.** A judgment on nonsuit must not be entered as a judgment on the merits, for the reason that the defendant might proceed with his own case, and obtain judgment on the merits, and by moving for a nonsuit he waives this right.<sup>161</sup>

**§ 4780a. Nonsuit — nature of.** A motion for a nonsuit is in the nature of a demurrer to the evidence. It admits the truth of the plaintiff's testimony, together with every inference of fact which the jury may legally draw from it.<sup>162</sup> Like a demurrer to

<sup>153</sup> Loatman v. Schluter, 71 Cal. 94.

<sup>154</sup> Greehn v. Marker, 67 Cal. 364.

<sup>155</sup> Wadsworth v. Union Pac. Ry. Co., 18 Col. 600.

<sup>156</sup> Noe v. Card, 14 Cal. 576; Ploche v. Paul, 22 id. 106.

<sup>157</sup> De Ro v. Cordes, 4 Cal. 117.

<sup>158</sup> McKee v. Greene, 31 Cal. 418.

<sup>159</sup> Sharon v. Davidson, 4 Nev. 416.

<sup>160</sup> Garner v. Marshall, 9 Cal. 268.

<sup>161</sup> Wood v. Raymond, 42 Cal. 645. A judgment of nonsuit is a final judgment within the meaning of the Idaho Code. Lalande v. McDonald, 2 Idaho, 283.

<sup>162</sup> Brown v. Lumber Co., 24 Oreg. 315; Warner v. Darrow, 91 Cal. 309; Butler v. Hyland, 89 id. 575.

evidence under the old English procedure, it is purely a question of law for the courts.<sup>163</sup> When at the close of all the testimony on behalf of both plaintiff and defendant the court directs the jury to find a verdict in favor of the defendant, which is accordingly done, this is in effect a judgment of nonsuit.<sup>164</sup> A voluntary nonsuit taken by the plaintiff at any time before trial does not estop him to bring a new action.<sup>165</sup>

**§ 4781. Motion.** A party moving for a nonsuit should state in his motion precisely the grounds upon which he relies, so that the attention of the court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case.<sup>166</sup> Where it is made without stating the grounds, it is not error to overrule it.<sup>167</sup> Defendant will not be allowed to raise new points afterwards in the Supreme Court.<sup>168</sup> If the grounds of the motion do not appear of record, the Supreme Court will not consider it.<sup>169</sup>

**§ 4782. When and when not granted.** Nonsuit is not proper where there is any evidence tending to prove the indebtedness.<sup>170</sup>

<sup>163</sup> *Kleinschmidt v. McAndrews*, 4 Mont. 8.

<sup>164</sup> *Powers v. Kenzie*, 15 Mont. 177; *Mayer v. Carothers*, 14 id. 274; *Creek v. McManus*, 13 id. 152; *Jensen v. Barbour*, 15 id. 582; and see *Marshall v. Mfg. Co.*, 1 S. Dak. 350; *Sanford v. Bell*, 2 N. Dak. 6; *Gurley v. Tompkins*, 17 Col. 437; § 4776, *ante*.

<sup>165</sup> *Martin v. McCarthy*, 3 Col. App. 37; and see *Lambert v. Sandford*, 2 Blackf. 137; 18 Am. Dec. 149.

<sup>166</sup> *People v. Banvard*, 27 Cal. 474.

<sup>167</sup> *Killer v. Kimbal*, 10 Cal. 267; *Wright v. Insurance Co.*, 12 Mont. 474; *Silva v. Holland*, 74 Cal. 530; *Flynn v. Dougherty*, 91 id. 669; *Coffey v. Greenfield*, 62 id. 602; *Miller v. Luca*, 80 id. 257; *Shain v. Forbes*, 82 id. 577; *Palmer v. Publishing Co.*, 90 id. 168; *Belcher v. Murphy*, 81 id. 39; *Carter v. Hopkins*, 79 id. 82. But this rule does not apply where the plaintiff's case could not be cured, even if attention had been called to its defects by a specification of the grounds of the motion for nonsuit. *Daley v. Russ*, 86 Cal. 114.

<sup>168</sup> *Raimond v. Eldridge*, 43 Cal. 506; *Johnson v. Moss*, 45 id. 518.

<sup>169</sup> *Poehlman v. Kennedy*, 48 Cal. 201.

<sup>170</sup> *Cravens v. Dewey*, 13 Cal. 40. Nonsuit is properly denied when there is any evidence tending to sustain the plaintiff's case. *Warren v. McGill*, 103 Cal. 153; *Wright v. Roseberry*, 81 id. 87; *Low v. Warden*, 70 id. 19; *Felton v. Millard*, 81 id. 540; *Catlin Land, etc., Co. v. Best*, 2 Col. App. 481; *Ferrera v. Parke*, 19 Oreg. 141; *Salomon v. Cross*, 22 id. 177; *Blue v. McCabe*, 5 Wash. St. 125; *Bowers v. Railroad Co.*, 4 Utah, 215; *Black v. City of Lewiston*, 2 Idaho, 254. On motion for nonsuit that which the evidence tends to prove will

If the evidence of the plaintiff would not authorize a jury to find a verdict for him, or if the court would set it aside if so found as contrary to evidence, it is the duty of the court to nonsuit the plaintiff.<sup>171</sup> So if he fails to offer any evidence.<sup>172</sup> A plaintiff should not be nonsuited for the nonpayment of the costs of two former suits for the same cause of action.<sup>173</sup> Where leave has been obtained to file an amended complaint to correspond with the proofs, it is error to direct a nonsuit for insufficiency of the original complaint, if the proofs show a cause of action.<sup>174</sup> So in an action to recover a balance due upon account, it is error to nonsuit the plaintiff, when it appears from the evidence that he had given an order to a third party for the sum due from the defendant, on the supposition that it was a certain amount, but in fact, as the evidence showed, there was a further balance due him.<sup>175</sup> Where the evidence makes out a sufficient *prima facie* case to entitle the plaintiff to go to the jury, a judgment of nonsuit is erroneous.<sup>176</sup> It is error to grant a nonsuit, unless the grounds therefor are called to the attention of the trial judge and the plaintiff at the time the motion is made.<sup>177</sup> Where a motion for nonsuit is improperly denied, and the defendant subsequently introduces testimony supplying the defect in the plaintiff's evidence, the error is thereby cured.<sup>178</sup>

be regarded as proved. *State v. Benton*, 13 Mont. 306; *Sayer v. Water Co.*, 15 id. 1; and see *Whitney Mfg. Co. v. Railroad Co.*, 38 S. C. 365; 37 Am. St. Rep. 767; *Wallace v. Railroad Co.*, 26 Oreg. 174; *Williams v. Norton*, 3 Kan. 295.

<sup>171</sup> *Mateer v. Brown*, 1 Cal. 221; 52 Am. Dec. 303; see, also, to same effect, *Denver, etc., R. R. Co. v. Pickard*, 8 Col. 163; *City of Denver v. Soloman*, 2 Col. App. 534; *Guldager v. Rockwell*, 14 Col. 459; *Wagner v. Kindel*, 4 Col. App. 168; *Brasher v. Railway Co.*, 12 Col. 384; *Lord v. Refining Co.*, 12 id. 390; *Un. Pac. Ry. Co. v. Sternberg*, 13 id. 141; *Grant v. Baker*, 12 Oreg. 329; *Herbert v. Dufus*, 23 id. 462; *Williams v. Williams*, 1 Col. App. 281; *Hogele v. Wilson*, 5 Wash. St. 160; *Garver v. Lynde*, 7 Mont. 108; *Linkauf v. Lombard*, 137 N. Y. 417; 33 Am. St. Rep. 743.

<sup>172</sup> *Kohler v. Wells, Fargo & Co.*, 26 Cal. 607; *Langhoff v. Milwaukee, etc., R. R. Co.*, 19 Wis. 489.

<sup>173</sup> *Janeway v. Skerritt*, 1 Vroom (N. J.), 97.

<sup>174</sup> *Richardson v. Coal Co.*, 6 Wash. St. 52.

<sup>175</sup> *Patchen v. Machinery Co.*, 6 Wash. St. 486.

<sup>176</sup> *Milton v. Railroad Co.*, 1 Col. App. 307.

<sup>177</sup> *Palmer v. Publishing Co.*, 90 Cal. 168.

<sup>178</sup> *Higgins v. Ragsdale*, 83 Cal. 219; and see *Cattell v. Fergusson*, 3 Wash. St. 541; *Well v. Nevitt*, 18 Col. 10; *Woodbury v. Hinckley*,



§ 4782a. **Nonsuit — miscellaneous.** If a complaint states several causes of action, and the answer admits one, a nonsuit as to that one should not be granted.<sup>179</sup> If an answer is in the nature of a confession and avoidance, and the only issue in the case arises between it and the denials of the reply, a judgment of nonsuit on motion of the defendant is not authorized by the Oregon Code.<sup>180</sup> It is not error to permit a defendant to renew a motion for a nonsuit after introducing evidence in his own behalf, when the entire evidence is such that if the motion had been denied and a verdict found for the plaintiff, it would have been the duty of the court to set the verdict aside as not supported by the evidence.<sup>181</sup> The right to take a nonsuit remains with the plaintiff throughout the entire proceeding.<sup>182</sup> A nonsuit can be properly granted after all the evidence on both sides is closed.<sup>183</sup> And findings are not required nor proper in a case of nonsuit.<sup>184</sup> It is within the discretion of the trial court to allow a plaintiff to introduce further evidence after a motion for nonsuit is made, and before it is decided;<sup>185</sup> or, after the denial of a motion for a nonsuit, to supplement his case by additional proof.<sup>186</sup> Where there is a variance between the proof and the complaint in an action, the proof having been received without objection, the court should, upon a motion for a nonsuit, consider the complaint amended to correspond with the facts proven.<sup>187</sup> In an action to quiet title, a nonsuit should not be granted for failure of the plaintiff, after having proved title in himself, to prove an adverse claim, title, or interest in the defendants, when the complaint alleges and the answer ad-

3 Col. App. 210. If a motion for a nonsuit is made and overruled, and thereupon the defendant proceeds and puts in testimony, the error, if any, in refusing the nonsuit is waived. *Brown v. South. Pac. Co.*, 7 Utah, 288; *Railroad Co. v. Mares*, 123 U. S. 710; *Insurance Co. v. Smith*, 124 id. 405.

<sup>179</sup> *Gaus v. Woodfolk*, 2 Mont. 458.

<sup>180</sup> *Rader v. McElvane*, 21 Oreg. 56.

<sup>181</sup> *Fagundes v. Railroad Co.*, 79 Cal. 97; and see *Morgan v. Coal Co.*, 6 Wash. St. 277; *Fox v. South. Pac. Co.*, 95 Cal. 234.

<sup>182</sup> *Currie v. South. Pac. Co.*, 23 Oreg. 400.

<sup>183</sup> *Vanderford v. Foster*, 64 Cal. 49; *Toulouse v. Pare*, 103 id. 251.

<sup>184</sup> *Id.*; *Reynolds v. Brumagim*, 54 Cal. 254; *Harney v. McLeran*, 66 id. 34.

<sup>185</sup> *Tuller v. Arnold*, 98 Cal. 522.

<sup>186</sup> *Garber v. Glanella*, 98 Cal. 527.

<sup>187</sup> *Murray v. Meade*, 5 Wash. St. 693.



mits that the defendants claim and assert an interest in the property.<sup>188</sup>

§ 4782b. **The same — relief against stipulation.** It is within the discretion of the trial court to relieve a plaintiff from the effect of a stipulation submitting the case on a motion for a nonsuit, and to allow him to file an amended complaint, and its action will not be disturbed upon appeal in the absence of a showing of an abuse of discretion.<sup>189</sup>

§ 4782c. **The same — payment of jury.** Where a nonsuit is granted in a civil case, and the jury discharged, the jury fees must be paid by the plaintiff, and no further proceedings should be allowed in the case until such payment.<sup>190</sup>

§ 4782d. **The same — review on appeal.** An error in granting a nonsuit is an error of law, and should be excepted to and specified as such upon an appeal from the judgment, and can not be reviewed upon the ground that the evidence is insufficient to support the decision.<sup>191</sup> The only grounds upon which a motion for nonsuit can be reviewed upon appeal are those specifically stated when the motion was made.<sup>192</sup> If any one of the several grounds for the motion is sufficient, a judgment of nonsuit will not be reversed, although the court may have founded its ruling upon an inadequate reason.<sup>193</sup> If it does not appear from the record on appeal that any grounds for a nonsuit were stated in the motion therefor, no error appears in overruling the motion.<sup>194</sup> In considering the trial court's ruling in granting a nonsuit, it is the duty of the appellate court to take as proven every fact which the plaintiff's evidence tended to prove, and which was essential to

<sup>188</sup> Vaca Valley, etc., R. R. Co. v. Mansfield, 84 Cal. 560.

<sup>189</sup> Robinson v. Exempt Fire Co., 103 Cal. 1.

<sup>190</sup> Lukes v. Logan, 66 Cal. 33; Fairchild v. King, 102 id. 320.

<sup>191</sup> Warner v. Darrow, 91 Cal. 309; see, also, Toulouse v. Pare 103 id. 251; O'Connor v. Hooper, 102 id. 528; McKay v. Railway Co., 13 Mont. 15; Herbert v. Dufur, 23 Oreg. 462. Record on appeal. See Rooney v. Tong, 4 Mont. 597; McKay v. Railway Co., 13 id. 15; Roberts v. Parrish, 17 Oreg. 583; Coffin v. Hutchinson, 22 id. 554; Fisher v. Kelly, 26 id. 249. A motion for nonsuit is no part of the judgment-roll. Barber v. Briscoe, 8 Mont. 224.

<sup>192</sup> Bronzan v. Drobaz, 93 Cal. 647.

<sup>193</sup> Brennan v. Railway Co., 8 Wash. St. 363.

<sup>194</sup> Loring v. Stuart, 79 Cal. 200.

his recovery, and give him the benefit of all legal presumptions arising therefrom.<sup>195</sup> Where after the denial *pro forma* of a motion for a nonsuit, the defendant declined to offer any evidence, and the cause was submitted upon briefs, the fact that the court, without the plaintiff's consent, and before the expiration of the time for presenting the reply brief, entered an order granting a nonsuit and dismissing the action, is a harmless error, and is not ground for a reversal of the judgment for nonsuit, if, upon the case made, the plaintiff was not entitled to recover.<sup>196</sup>

**§ 4783. Judgment by default — entry of default by clerk.**

*Form No. 1137.*

In this action, the defendant, C. D., having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant, C. D., in the premises is hereby duly entered according to law.

Attest my hand, and the seal of said court, this .....  
day of . . . . ., 18..

[SEAL.]

[SIGNATURE.]

**§ 4784. Clerk's duty.** The entry of a default in a case authorized by law is a ministerial act to be performed by the clerk, and the disqualification of the judge of the court to try the cause does not disqualify the clerk for the performance of this duty.<sup>197</sup> When the law declares what the judgment shall be, a judgment on default is not the judgment of the clerk.<sup>198</sup> The clerk derives all his power in entering a default without an order of the court from the statute, and when he enters a default, it must appear that all the facts existed which the law requires to authorize it.<sup>199</sup>

<sup>195</sup> *Brown v. Warren*, 16 Nev. 231; *Patchen v. Keeley*, 19 Id. 404.

<sup>196</sup> *Vincent v. Pacific Grove*, 102 Cal. 405.

<sup>197</sup> *People v. De Carrillo*, 35 Cal. 37.

<sup>198</sup> *Harding v. Cowling*, 28 Cal. 212. A valid judgment by default may be rendered by the court, though no formal default has been entered. *Herman v. Santee*, 103 Cal. 519.

<sup>199</sup> *Providence Tool Co. v. Prader*, 32 Cal. 634; 91 Am. Dec. 598; see, also, *Reinhart v. Lugo*, 86 Cal. 395; *Graydon v. Thomas*, 3 Oreg. 250; *Kelly v. Van Austin*, 17 Cal. 564.

§ 4785. **Default, what admits and cures.** A default admits only the facts alleged in the complaint.<sup>200</sup> So where title as administrator is averred.<sup>201</sup> So of title in ejectment.<sup>202</sup> A default on a complaint containing special counts defectively stated, and also the common counts in *assumpsit* properly stated, will support a judgment—the default being a confession of the indebtedness for the causes and on the accounts alleged in the complaint.<sup>203</sup> A default cures a defective allegation of fact, but not an entire absence of any allegation.<sup>204</sup>

§ 4786. **Order of court required.** Where a frivolous demurrer is filed, and no leave is asked to file an answer, it is not error for the court to enter a default and judgment upon overruling the demurrer.<sup>205</sup> If an answer is filed raising an issue or issues, and a trial is had, and witnesses are sworn and examined, and the court takes the case into consideration, it can not then strike the answer of the defendant and enter his default, and render judgment for plaintiff for the amount claimed in the complaint.<sup>206</sup>

<sup>200</sup> Harlan v. Smith, 6 Cal. 173; McGregor v. Shaw, 11 id. 47.

<sup>201</sup> Curtis v. Herrick, 14 Cal. 117; 73 Am. Dec. 632.

<sup>202</sup> Smith v. Billett, 15 Cal. 23.

<sup>203</sup> Hunt v. City of San Francisco, 11 Cal. 250.

<sup>204</sup> Hentsch v. Porter, 10 Cal. 555; Barron v. Frink, 30 id. 489.

<sup>205</sup> Seale v. McLaughlin, 23 Cal. 668. Where demurrer is overruled, and the defendant fails to file an answer within the time granted him, the clerk is authorized to enter his default, and judgment for the amount specified in the summons. Bailey v. Sloan, 65 Cal. 387; Wall v. Heald, 95 id. 364; Campbell v. West, 86 id. 197. But if the notice of the decision required by the statute (Cal. Code Civ. Pro., § 476) is not given or waived, the time to answer does not run, and judgment by default can not properly be entered. Chamberlain v. County of Del Norte, 77 Cal. 150; see Shearman v. Jorgensen, 106 id. 483. Judgment entered by default, before time for answering has expired, is voidable. Harnish v. Bramer, 71 Cal. 155. Under the Code of Colorado a default for want of answer can not be entered pending a motion filed by the defendant. Atchison, etc., R. R. Co. v. Nicholls, 8 Col. 188; Chivington v. Springs Co., 9 id. 597; Dillon v. Rand, 15 id. 372; nor until the expiration of forty days after the completion of constructive service of summons by publication. O'Rear v. Lazarus, 8 Col. 608.

<sup>206</sup> Abbott v. Douglass, 28 Cal. 295.

**§ 4787. Judgment by default.***Form No. 1138.*

[TITLE.]

In this action the defendant C. D., having been regularly served with process, and having failed to appear and answer the plaintiff's complaint herein, and the legal time for answering having expired, and the default of the said defendant in the premises having been duly entered according to law; now, at this day, on application of E. F., attorney for said plaintiff:

It is ordered that judgment be entered herein against the said defendant C. D., as well as against the defendant E. D., not served with process, in accordance with the prayer of said plaintiff's complaint on file herein.

Wherefore, by reason of the law and the premises aforesaid, it is ordered and adjudged that A. B., plaintiff, do have and recover of and from the said defendants, C. D. and E. D., the sum of ..... dollars, with interest thereon, at the rate of ..... per cent. per month, from the date hereof until paid; together with said plaintiff's costs and disbursements incurred in said action, amounting to the sum of ..... dollars.

And it is further ordered and adjudged that said plaintiff do have execution against the separate property of the defendant C. D., as well as against the joint property of all the said defendants.

Judgment rendered on the ..... day of ....., 18..

**§ 4788. Against whom entered.** A judgment by default may as well be taken against an administrator as any other party;<sup>207</sup> also against a municipal corporation as well as against a private person.<sup>208</sup> Where the action is against defendants severally liable, a portion only being served with process, the clerk can, on application of plaintiff, enter judgment, upon default, against the parties served, without regard to the other parties named in the complaint.<sup>209</sup> But otherwise if they are jointly liable.<sup>210</sup>

<sup>207</sup> Chase v. Swain, 9 Cal. 130.

<sup>208</sup> Hunt v. City of San Francisco, 11 Cal. 250.

<sup>209</sup> Kelly v. Van Austin, 17 Cal. 564.

<sup>210</sup> Id.; Junkans v. Bergin, 64 Cal. 203; Curry v. Roundtree, 51 id. 184; compare Wharton v. Harlan, 68 id. 422; Edwards v. Hellings, 103 id. 204.

If persons are served with summons who are not named in the complaint, either by real or fictitious names, it is error to render judgment against them by default.<sup>211</sup>

**§ 4789. Effect of.** Where the summons has been duly served, a judgment by default amounts to a confession on the part of the defendants of all the material facts in the complaint.<sup>212</sup> The fact that one defendant who suffered judgment by default is not estopped as to an issue made by the other defendants, upon which they succeeded, does not prevent the judgment upon this issue from being an estoppel between the plaintiff and the defendants who pleaded it.<sup>213</sup> In an action upon a joint contract, if one be defaulted and the other go to trial on a plea that is peculiar to himself, a judgment in his favor will not discharge the defaulted defendant; otherwise if the matter pleaded be a defense common to both defendants.<sup>214</sup>

**§ 4790. Entry of.** The clerk of a court, in entering a judgment after default, acts in a mere ministerial capacity, and can not render a judgment granting any relief beyond that warranted by the facts stated in the complaint.<sup>215</sup> A judgment entered by the clerk, upon default, for a sum greater than is demanded in the prayer of the complaint and specified in the summons, is not void, but is simply erroneous, and may be enforced until modified on motion or on appeal.<sup>216</sup>

<sup>211</sup> *Lamping v. Hyatt*, 27 Cal. 102. Judgment entered by the clerk by default where there has been no service of summons or appearance is utterly void. *Lyons v. Cunningham*, 66 Cal. 42; and see *Hyde v. Redding*, 74 id. 493; *Norton v. Railroad Co.*, 97 id. 388; *Reinhart v. Lugo*, 86 id. 395; *Spokane Falls v. Curry*, 2 Wash. St. 541; *Yentzer v. Thayer*, 10 Col. 63; *Howard v. Clark*, 43 Mo. 344. The entry of judgment against a defendant, who has been served after the overruling of his demurrer to the complaint, without at the same time entering judgment against a codefendant not served, is in accordance with the statute. *Edwards v. Hellings*, 103 Cal. 204.

<sup>212</sup> *Rowe v. Table Mountain Water Co.*, 10 Cal. 441.

<sup>213</sup> *Jackson v. Lodge*, 36 Cal. 28.

<sup>214</sup> *Swanzy v. Parker*, 50 Penn. St. 441; 88 Am. Dec. 549.

<sup>215</sup> *Gray v. Palmer*, 28 Cal. 416; *Wallace v. Eldredge* (No. 1), 27 id. 495; *Kelly v. Van Austin*, 17 id. 564; *Willson v. Cleaveland*, 30 id. 192; *Leese v. Clark*, 28 id. 26.

<sup>216</sup> *Bond v. Pacheco*, 30 Cal. 531. Judgment by default which grants relief other and different from that prayed for in the complaint, and specified in the summons, is improper. *Mudge v. Steinhart*, 78 Cal. 34.

§ 4791. **Errors, how reviewed.** There may be error in a judgment by default, as well as in a judgment rendered upon issue joined in the pleadings and tried by a jury; and in the former as well as the latter case the error may be corrected on appeal.<sup>217</sup> Judgment by default before the expiration of the full time will be reversed on appeal.<sup>218</sup> If the summons be radically defective, it will not support a judgment by default.<sup>219</sup> So where the record shows that the defendant has not been legally served with process.<sup>220</sup> A notice in summons that a money judgment would be taken will not support a judgment for fraud.<sup>221</sup> Where the complaint shows no legal cause of action, a judgment by default can no more be taken than it can be over a general demurrer.<sup>222</sup> A judgment rendered upon a complaint radically defective may be treated as a nullity.<sup>223</sup>

§ 4792. **Proof, when required.**<sup>224</sup> A judgment in ejectment awarding damages rendered on a default will not be reversed because it does not appear that the court examined witnesses upon the question of damages.<sup>225</sup>

§ 4793. **Relief granted.** If judgment is rendered in favor of plaintiff by default, the court can not grant any greater relief than is demanded in the prayer of the complaint and specified in the summons.<sup>226</sup> If the prayer for judgment asks for interest to accrue after the complaint is filed, and neither the prayer nor summons mention the rate of interest, the clerk should not render judgment for a rate greater than ten per cent. per annum.<sup>227</sup> Interest is to be allowed on cash advances as a matter

<sup>217</sup> *Stevens v. Ross*, 1 Cal. 94; see § 4782d. *ante*.

<sup>218</sup> *Burt v. Scranton*, 1 Cal. 416.

<sup>219</sup> *People v. Woodlief*, 2 Cal. 242.

<sup>220</sup> *Joyce v. Joyce*, 5 Cal. 449; *People v. Pearson*, 76 *id.* 400; *Barney v. Vigoureaux*, 75 *id.* 376.

<sup>221</sup> *Porter v. Hermann*, 8 Cal. 619.

<sup>222</sup> *Abbe v. Marr*, 14 Cal. 210.

<sup>223</sup> *Reynolds v. Harris*, 9 Cal. 338.

<sup>224</sup> See *Tuolumne Redemption Co. v. Patterson*, 18 Cal. 416; *Lick v. Stockdale*, *id.* 219. Also subdivisions 2 and 3 of section 585, Cal. Code Civ. Pro.

<sup>225</sup> *Dimick v. Campbell*, 31 Cal. 238.

<sup>226</sup> Cal. Code Civ. Pro., § 580; *Lamping v. Hyatt*, 27 Cal. 102; *Gage v. Rogers*, 20 *id.* 91; *Lattimer v. Ryan*, *id.* 628.

<sup>227</sup> *Lamping v. Hyatt*, 27 Cal. 102; *Gautier v. English*, 29 *id.* 165; Cal. Civil Code, § 1917.

of law.<sup>228</sup> In an action in Massachusetts on a note made payable in New York, interest at the legal rate of the former state only will be allowed.<sup>229</sup>

§ 4794. **Waiver of default.** An acceptance by plaintiff's attorney of service of a demurrer, filed by a defendant after his default has been entered, is a waiver of the default.<sup>230</sup>

§ 4795. **When to be entered.** If no answer has been filed with the clerk of the court within the time specified in the summons, or such further time as may have been granted, in an action arising upon contract for the recovery of money or damages only, the clerk upon application of the plaintiff shall enter the default of the defendant, and immediately thereafter enter judgment for the amount specified in the summons, including the costs, against the defendant. In other actions, the clerk shall enter the default of the defendant; and thereafter the plaintiff may apply at the first or any subsequent term of the court for the relief demanded in the complaint. Where the service of the summons was by publication, the plaintiff upon the expiration of the time designated in the order of publication may, upon proof of the publication and that no answer has been filed, apply for judgment; but proof of the demand in such case shall be required.<sup>231</sup>

§ 4796. **Setting aside judgment, grounds of.** A party against whom an unjust judgment has been obtained through accident, mistake, or fraud, may, after the adjournment of the term at which judgment was rendered, and where no want of diligence is imputable to him in seeking relief, maintain an equitable

<sup>228</sup> Field v. Burnam, 3 Bush, 518. As to interest generally, as a part of the relief granted, see Skillman v. Lachman, 23 Cal. 199; 83 Am. Dec. 96; Estate of Isaacs, 30 id. 105; Bibend v. London, etc., Insurance Co., id. 78; Dunne v. Mastick, 50 id. 247; Brady v. Wilcoxson, 44 id. 245; Goldsmith v. Sawyer, 46 id. 213; Lander v. Castro, 43 id. 498; also, Cal. Civil Code, §§ 1916, 1917, 3287.

<sup>229</sup> Ayer v. Tilden, 15 Gray, 178; 77 Am. Dec. 355.

<sup>230</sup> Hestres v. Clements, 21 Cal. 425.

<sup>231</sup> Cal. Code Civ. Pra., § 585. The provision that the clerk must enter the judgment *immediately* after entering default is merely directory, and does not render void a judgment subsequently entered upon such default, nor can the defendant against whom the judgment is entered invoke such failure for the purpose of annulling a judgment to which he has no other defense. Edwards v. Hillings, 103 Cal. 204.



action to set aside the judgment.<sup>232</sup> In cases of fraud in obtaining the judgment, the party aggrieved must proceed by a bill to impeach the original decree for fraud, etc.<sup>233</sup> Insufficient grounds.<sup>234</sup> If a judgment is erroneous, the defendant has his remedy by appeal; if void upon its face, he has in addition his remedy by motion, at any time, in the court by which the judgment was rendered.<sup>235</sup>

§ 4797. **Jurisdiction.** All courts having chancery jurisdiction have power to set aside a judgment improperly obtained.<sup>236</sup> A party is not confined to his remedy by statute, but may resort to a court of equity for relief against a judgment obtained by fraud or surprise.<sup>237</sup> The assistance of equity to set aside a

<sup>232</sup> *Bibend v. Kreutz*, 20 Cal. 109.

<sup>233</sup> *Robb v. Robb*, 6 Cal. 21.

<sup>234</sup> See *Markley v. Rand*, 12 Cal. 275; *Alderson v. Bell*, 9 id. 315.

<sup>235</sup> *Chipman v. Bowman*, 14 Cal. 157; *Logan v. Hillegass*, 16 id. 200; *Bell v. Thompson*, 19 id. 706; *Sanchez v. Carriaga*, 31 id. 170; cited in *Murdock v. De Vries*, 37 id. 527; see *Norton v. Railroad Co.*, 97 id. 388; *De La Montanya v. De La Montanya*, 112 id. 101. The California Code of Civil Procedure now provides as follows: A judgment or decree of a Superior Court, when based upon findings of fact made by the court, or the special verdict of a jury, may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered, for either of the following causes, materially affecting the substantial rights of such party and entitling him to a different judgment: (1.) Incorrect or erroneous conclusions of law not consistent with or not supported by the findings of fact; and in such case when the judgment is set aside, the conclusions of law shall be corrected and amended. (2.) A judgment or decree not consistent with or not supported by the special verdict. Cal. Code Civ. Pro., new section 663, added by act of 1897. The party intending to make the motion mentioned in the last section must, within ten days after notice of the rendition of judgment or decree, serve upon the adverse party and file with the clerk of the court a notice of his intention, designating the grounds upon which the motion will be made, and specifying the particulars in which the conclusions of law are not consistent with the findings of facts, or in which the judgment or decree is not consistent with the special verdict. The said party must, within sixty days after giving such notice of intention, make the motion to the court, after giving due notice of the time of making such motion to the adverse party; but the hearing or consideration of such motion may be further continued by the court. Id., new section 663 1-2, added by act of 1897.

<sup>236</sup> *The People v. Lafarge*, 3 Cal. 130.

<sup>237</sup> *Carpentier v. Hart*, 5 Cal. 406; and see *Dunlap v. Steere*, 92 id. 344.



judgment can not be invoked in a distinct action, so long as the remedy by motion in the original case exists.<sup>238</sup>

§ 4798. **Motion, when to be made.** At common law, after the adjournment of the term, the court loses all control over cases decided, unless its jurisdiction is saved by some motion or proceeding at the time; but in most states there are special statutes fixing the time within which a motion to set aside a judgment must be made. In California, where the party has failed to apply for relief during the term, relief may be granted in vacation within a reasonable time, not exceeding six months after the close of the term.<sup>239</sup> If the summons has not been personally served on the defendant, he may be allowed, on such terms as may be just, to answer to the merits of the action at any time within one year after the rendition of the judgment.<sup>240</sup> During the term at which a judgment was rendered, a District Court may perhaps, even without a statement or affidavits, upon motion of a party injured, amend or set aside an erroneous judgment; but to continue full and complete jurisdiction in the court over the case beyond the term, some order must be made or proceedings taken in accordance with statute.<sup>241</sup> In New York, two years is allowed for opening up a judgment, and no more.<sup>242</sup> But not a limitation where summons was not served.<sup>243</sup>

<sup>238</sup> *Bibend v. Kreutz*, 20 Cal. 109.

<sup>239</sup> Cal. Code Civ. Pro., § 473. This provision construed. See *Wolff v. Railway Co.*, 89 Cal. 332; *Wharton v. Harlan*, 68 id. 422; *Kittle v. Bellegarde*, 86 id. 556; *Howard v. McChesney*, 103 id. 536. Application to open a default, made after the adjournment of the term at which the judgment by default was rendered, can not be entertained unless the moving party makes a showing of reason why he failed to make the application during the term. *Mahoney v. Mahoney*, 51 Cal. 118. The court may at any time set aside a judgment by default entered by the clerk when it appears upon the face of the judgment-roll that the clerk had no power to enter it. *Wharton v. Harlan*, 68 Cal. 422. A judgment by default rendered upon a constructive service of summons by publication, without any affidavit or order for the publication, is void, and a motion by the defendant to vacate such a judgment is in time, although made more than ten years after its entry. *People v. Pearson*, 76 Cal. 400.

<sup>240</sup> Cal. Code Civ. Pro., § 473.

<sup>241</sup> *State v. First Nat. Bank*, 4 Nev. 358; see *Horton v. New Pass Co.*, 21 id. 184.

<sup>242</sup> *Hendricks v. Carpenter*, 2 Robt. 625.

<sup>243</sup> *Weeks v. Merritt*, 5 Robt. 610.

§ 4799. **Parties not concluded by the record.** In a direct proceeding in the same action to set aside a judgment, under section sixty-eight of the Practice Act, the parties are not concluded by the record in any respect; on the contrary, they are allowed to show the true facts of the case by any competent evidence; *aliter*, if the question had arisen collaterally.<sup>244</sup>

§ 4800. **Notice of motion to set aside a judgment by default.**  
*Form No. 1139.*

[TITLE.]

[ADDRESS.]

Take notice, that upon the affidavit, a copy of which is herewith served, I will move said court, at the city hall [or other place, designating it], on the ..... day of ....., 18.., at the hour of ..... o'clock, A. M., of said day, or as soon thereafter as counsel can be heard, that the judgment entered by default against the defendant in this action, and all subsequent proceedings therein, be set aside, for the reasons following [state reasons in full].

[DATE.]

[SIGNATURE.]

§ 4801. **Answer to the merits.** The better practice is to prepare and exhibit to the court the defendant's answer at the hearing of a motion to set aside a default.<sup>245</sup> A copy of the answer should be served with the notice of motion. Where the merits are shown by affidavit, counter-affidavits on that question will not be heard.<sup>246</sup>

§ 4802. **Discretion of court.** The granting or refusing a motion to set aside a default based upon affidavits is a matter within the proper discretion of the court, and unless that discretion has been abused the appellate courts will not interfere.<sup>247</sup> Although an order of the court below setting aside or refusing to set aside a judgment by default rests much in the discretion

<sup>244</sup> *McKinley v. Tuttle*, 34 Cal. 235. An application under section 473, California Code of Civil Procedure, must be by proceeding in the cause wherein the default was taken, and not by separate suit for relief against the judgment. *Estate of Griffith*, 84 Cal. 107.

<sup>245</sup> *Bailey v. Taaffe*, 29 Cal. 422.

<sup>246</sup> *Gracier v. Weir*, 45 Cal. 54; *Douglass v. Todd*, 96 id. 655. When the record does not show that a default was not properly entered, the presumption arises that the required notice was given. *Evans v. Young*, 10 Col. 316.

<sup>247</sup> *Woodward v. Backus*, 20 Cal. 137; *Roland v. Kreyenhagen*, 18 id. 455; *Howe v. Independence, etc., Co.*, 29 id. 72.

of the court, and will not be disturbed by the appellate court unless plainly erroneous, yet the discretion of the court below is not a mental discretion, to be exercised *ex gratia*, but is a legal discretion, to be exercised in conformity with the law.<sup>248</sup>

§ 4803. **Motion, when to be made.** A motion may be made to set aside a default entered by the clerk, at any time before final judgment is rendered in the action, notwithstanding the court had adjourned for the term at which the default was entered, before the motion is made to vacate it.<sup>249</sup>

§ 4804. **Motion will be refused.** A judgment by default should not be set aside on the ground of excusable neglect, because the preparation of the answer required more time than ordinary cases, and during a portion of the time the attorney was absent from town.<sup>250</sup>

§ 4805. **On terms.** The court may, upon such terms as may be just, relieve a party, or his legal representatives, from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. An order to release a party from a judgment taken against him by default,

<sup>248</sup> *Bailey v. Taaffe*, 29 Cal. 422. Exercise of discretion by court in opening defaults. See *Dougherty v. Nevada Bank*, 68 Cal. 275; *Buell v. Emerich*, 85 id. 116; *Wolff v. Railway Co.*, 89 id. 332; *Garner v. Erlanger*, 86 id. 60; *Reinhart v. Lugo*, id. 395; *Youngman v. Tanner*, 82 id. 611; *Mulkey v. Mulkey*, 100 id. 91; *Burns v. Scooffy*, 98 id. 271; *Haggin v. Lorentz*, 13 Mont. 406; *Martin v. De Loge*, 15 id. 343; *Spokane Falls v. Curry*, 2 Wash. St. 541; *Haynes v. Schwartz Co.*, 5 id. 433.

<sup>249</sup> *Willson v. Cleaveland*, 30 Cal. 192; see § 4796, *ante*. Leave to renew motion to set aside a default which has once been denied. See *Jensen v. Barbour*, 12 Mont. 566. A motion to set aside a judgment by default may be withdrawn upon leave of the court without notice to the adverse party. *Id.*

<sup>250</sup> *Bailey v. Taaffe*, 29 Cal. 422; see, also, *People v. O'Connell*, 23 id. 282; and *Parrott v. Den*, 34 id. 79; *Haight v. Green*, 19 id. 113; *Edwards v. Hellings*, 103 id. 204; *Williamson v. Drill Co.*, 95 id. 652; *Sanborn v. Manufacturing Co.*, 5 Wash. St. 150; *Haley v. Eureka County Bank*, 20 Nev. 410. A judgment by default can not be set aside upon a mere abstract allegation of inadvertence of the attorney in serving or filing the answer, but the reason for the inadvertence must be stated. *Shearman v. Jorgensen*, 106 Cal. 483. Instances of excusable neglect. See *Craig v. Investment Co.*, 101 Cal. 122; *Fulweiler v. Mining Co.*, 83 id. 126; *Burns v. Scooffy*, 98 id. 271; *Bast v. Hyson*, 6 Wash. St. 170; *Douglass v. Todd*, 96 Cal. 655.

under the sixty-eighth section of the Practice Act, Code of Civil Procedure, section 473, should only be granted upon the terms, as a condition precedent of payment of all costs accruing to the adverse party to the time of service and filing of notice of motion thereof.<sup>251</sup> Where a motion to set aside judgment is granted "on payment of all costs," the judgment remains in force until the costs are paid.<sup>252</sup>

**§ 4806. Affidavit to set aside judgment by default.**

*Form No. 1140.*

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled action.

II. The summons and complaint in this action were served on me on the ..... day of ....., 18..

III. Through mistake [inadvertence, surprise, or neglect, as the case may be] of ..... [state the circumstances], I was prevented from appearing and answering this action.

IV. I further say that I have fully and fairly stated the facts of the case in this cause to G. H., my counsel, who resides at No. .... street, in the city of ....., and after such statement I am advised by him that I have a good and substantial defense on the merits of the action, and verily believe the same to be true.

[JURAT.]

[SIGNATURE.]

**§ 4807. By whom made.** An affidavit on a motion to set aside a default should be made by the defendant, unless good reason exists for having it made by some one else.<sup>253</sup> A motion to set

<sup>251</sup> *Howe v. Independence, etc., Co.*, 29 Cal. 72; *Bailey v. Taaffe*, id. 422; *Leet v. Grants*, 36 id. 288; see *Wolff v. Railway Co.*, 98 Cal. 332. It is not an abuse of discretion for the trial court to vacate a judgment by default, when the circumstances warrant it, without imposing terms as a condition to granting such relief. *Robinson v. Merrill*, 80 Cal. 415.

<sup>252</sup> *Gregory v. Haynes*, 21 Cal. 443; *Hartman v. Olvera*, 49 id. 101.

<sup>253</sup> *Bailey v. Taaffe*, 29 Cal. 422. As to when it may be made by purchaser under decree, see *Boggs v. Hargrave*, 16 Cal. 559; 76 Am. Dec. 561. The affidavit is not objectionable on the ground solely that it was made by counsel for the defendant. *In re Weringer*, 100 Cal. 345; *Byrne v. Alas*, 68 id. 479; *Horton v. New Pass Co.*, 21 Nev. 184. The affidavit may properly be made by one of two or more codefendants for the benefit of all. *Palmer v. Barclay*, 92 Cal. 199.

aside a judgment and for leave to answer will be overruled if there is no affidavit of merits.<sup>254</sup> An affidavit of defense, filed upon a motion to set aside a default, should set forth the facts relied upon, so that the court can judge of the merits of the defense.<sup>255</sup>

§ 4808. **Diligence must be shown.** A defendant who, having suffered a default, has obtained from the plaintiff a stipulation that the default may be set aside, must use reasonable diligence in applying to the court for the relief contemplated, or his right to relief will be lost. An unexplained delay of seven years in making the application will justify the court in refusing to enforce the stipulation.<sup>256</sup>

§ 4809. **Form of affidavit.** An affidavit on motion to vacate a judgment by default, under the sixty-eighth section of the Practice Act, must show: 1. That the default occurred through mistake, inadvertence, surprise, or excusable neglect; and 2. That the defendant has a meritorious defense.<sup>257</sup> An affidavit by the defendant that he was under the impression, when he retained counsel in a cause, that the time to answer had not expired; that he did not recollect the precise day upon which the summons and complaint were served; that he was quite ill at the time, and did not as carefully note the time as he otherwise would, is insufficient to open a judgment by default.<sup>258</sup>

<sup>254</sup> Parrott v. Den, 34 Cal. 79; Morgan v. McDonald, 70 id. 32; McBlain v. McBlain, 77 id. 507; Gauthier v. Rusicka, 3 N. Dak. 1; and see Mulkey v. Mulkey, 100 Cal. 91. The motion to set aside judgment where there is a false return of service of summons is based upon irregularity and want of jurisdiction in fact, and not upon the mistake, inadvertence, surprise, or excusable neglect of the moving party, and it is not necessary that the motion be accompanied by an affidavit of merits. Norton v. Railroad Co., 97 Cal. 388; and see Clark v. Baird, 98 id. 642.

<sup>255</sup> Florez v. Uhrig's Adm'r, 35 Mo. 517; Donnelly v. Clark, 6 Mont. 135. The filing of an answer after the entry of default does not affect the default, and it will not be set aside without the showing of some ground therefor. Irvine v. Davy, 88 Cal. 495.

<sup>256</sup> Reese v. Mahoney, 21 Cal. 305. As to diligence generally, see People v. Frisbie, 26 Cal. 135; Lewis v. Rigney, 21 id. 268; Kittle v. Bellegarde, 86 id. 556.

<sup>257</sup> Bailey v. Taaffe, 29 Cal. 422.

<sup>258</sup> Elliott v. Shaw, 16 Cal. 377. As to insufficiency of affidavit, consult Bailey v. Taaffe, 29 Cal. 422; People v. Rains, 23 id. 128; Elliott v. Shaw, 16 id. 377; People v. Lafarge, 3 id. 130; Nickerson

## § 4810. Judgment by the court.

*Form No. 1141.*

[TITLE.]

This cause came on regularly for trial on the ..... day of ....., 18.., E. F., Esq., appearing as counsel for the plaintiff, and G. H., Esq., for the defendant. A trial by jury having been expressly waived by the counsel for the respective parties the cause was tried before the court sitting without a jury, whereupon J. K. and L. M. were examined as witnesses on the part of the plaintiff, and N. O. and P. Q. were examined as witnesses on the part of the defendant, and the evidence being closed, the cause was submitted to the court for consideration and decision; and after due deliberation thereon, the court delivers its findings and decision in writing, which is filed, and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the finding aforesaid, it is ordered and adjudged that A. B., the plaintiff, do have and recover of and from C. D., the defendant, the sum of ..... dollars, with interest thereon at the rate of ..... per cent. per month, from the date hereof until paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of ..... dollars; and that said sum of ..... dollars and said interest be paid by said defendant in gold coin of the United States.

Judgment rendered ....., 18..

§ 4811. **Conclusiveness of judgment.** A judgment is of no force except between the parties and privies,<sup>259</sup> except in some cases for specific purposes.<sup>260</sup> One in possession of land, who is

*v. Raisin Co.*, 61 *Id.* 268; *Morgan v. McDonald*, 70 *Id.* 32. Sufficient affidavits. See *Will v. Water Co.*, 100 *Cal.* 344; *Fulweiler v. Mining Co.*, 83 *Id.* 126.

<sup>259</sup> *Beckett v. Selover*, 7 *Cal.* 228; 68 *Am. Dec.* 237; *Shay v. McNamara*, 54 *Cal.* 170. The judgment of a competent court, when properly pleaded, is conclusive in a subsequent action between the same parties for the same thing, although it be palpably erroneous. *Wolverton v. Baker*, 86 *Cal.* 591.

<sup>260</sup> *Gregory v. Haynes*, 13 *Cal.* 591; see, also, *Davidson v. Dallis*, 8 *Id.* 227; *Kitttridge v. Stevens*, 16 *Id.* 381. *Conclusiveness of judgment.*—If a fact has been once litigated in a court of competent jurisdiction the judgment rendered therein forever estops the parties and their privies from again litigating the same fact. *Hall v. Zeller*, 17 *Oreg.* 381; *Savage v. McCorkle*, *Id.* 42; and see, also, *Neil v. Tolman*, 12 *Id.* 289; *Barrett v. Falling*, 8 *Id.* 152; *Farquar v.*

neither a party nor a privy to a judgment for the recovery of possession of it is neither affected by the judgment as an instrument of evidence, nor can be dispossessed by virtue of a writ issued upon it.<sup>261</sup> On a trial by the court it may and should decide the whole case.<sup>262</sup>

§ 4812. *In equity.* The court may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.<sup>263</sup> Where a decision is made in a suit in equity upon any particular subject-matter, the rights of all persons whose interests are immediately connected with that decision, and affected by it, should be provided for.<sup>264</sup> Equity has jurisdiction to vacate a judgment fraudulently altered, so as to include a defendant not served with process and not originally included in the judgment.<sup>265</sup> An infant defendant is as much bound by the decree in equity as a person of full age.<sup>266</sup> And it is questionable under our practice whether he is entitled to have a day given in the judgment to show cause against it.<sup>267</sup> But the probate of a will is not conclusive on an infant or person of unsound mind until one year after their respective disabilities are removed.<sup>268</sup>

Farquar, 20 *Id.* 69; 23 *Am. St. Rep.* 93; *Finley v. Houser*, 22 *Oreg.* 562; *Crabill v. Crabill*, 22 *Id.* 588; *Harmon v. Auditor, etc.*, 123 *Ill.* 133; 5 *Am. St. Rep.* 507; *McWhorter v. Andrews*, 53 *Ark.* 312; but the estoppel does not extend to matters not in issue. *Id.* The doctrine has been broadly stated, however, that a judgment between parties is conclusive not only as to the matters which were in fact determined, but as to all other matters which might have been litigated as incidental or essentially connected with the subject-matter of the litigation, whether the same were or were not, as a matter of fact, considered. *Water Co. v. Middaugh*, 12 *Col.* 434; *Johnson v. Johnson*, 20 *Id.* 143; *Neill v. Tolman*, 12 *Oreg.* 289; *Sayward v. Thayer*, 9 *Wash. St.* 22; compare *Un. Pac. Ry. Co. v. Kelley*, 4 *Col. App.* 325; *Gallup v. Lichter*, 4 *Id.* 296; *Campbell v. Rankin*, 2 *Mont.* 363. Where several judgments have been rendered in actions between the same parties in respect to the same subject-matter the judgment last in point of time is conclusive. *Tyrrell v. Baldwin*, 67 *Cal.* 1. .

<sup>261</sup> *Le Roy v. Rogers*, 30 *Cal.* 229; 89 *Am. Dec.* 88.

<sup>262</sup> 1 *Bosw.* 281; *Van Valen v. Lapham*, 13 *How. Pr.* 246.

<sup>263</sup> *Cal. Code Civ. Pro.*, § 578.

<sup>264</sup> *McPherson v. Parker*, 30 *Cal.* 455; 89 *Am. Dec.* 129.

<sup>265</sup> *Chester v. Miller*, 13 *Cal.* 558; 89 *Am. Dec.* 172.

<sup>266</sup> *Joyce v. McAvoy*, 31 *Cal.* 273.

<sup>267</sup> *Id.*; *Cal. Code Civ. Pro.*, §§ 41, 42.

<sup>268</sup> *Cal. Code Civ. Pro.*, § 1333.



§ 4813. **In partition.** A judgment in an action for partition is binding and conclusive, as to title, upon all the parties who are served with summons or appear, and a bar to a new action.<sup>269</sup> But such judgment and partition shall not affect tenants for years less than ten, to the whole of the property which is the subject of the partition.<sup>270</sup> The effect of a judgment in partition is to be determined by our statute, and not by the common law.<sup>271</sup> The order of a court for a partition of lands, or for a sale, in case a partition can not properly be made, is not a final judgment, in an action for partition. They are to be succeeded by a judgment confirming the partition sale.<sup>272</sup>

§ 4814. **Replevin.** In replevin, a judgment for the plaintiff, in order to hold the sureties on the undertaking, must be in the alternative,<sup>273</sup> and must determine the controversy as to the whole property in dispute.<sup>274</sup>

§ 4815. **On the merits.** In California, in cases other than those mentioned in section 581 of the Political Code, judgment is rendered on the merits.<sup>275</sup> Where an answer is filed, the court may grant any relief consistent with the case made by the complaint, and embraced within the issue.<sup>276</sup>

§ 4816. **On report of referee.** A *mandamus* lies to compel the judge of a District Court to enter judgment on the report

<sup>269</sup> *Morenhout v. Higuera*, 32 Cal. 289. It is conclusive upon the parties and privies that they were tenants in common and in possession of the land at the date of its rendition. *Morrill v. Morrill*, 20 Oreg. 96; 23 Am. St. Rep. 101.

<sup>270</sup> Cal. Code Civ. Pro., § 767. In the absence of fraud or collusion, minors properly represented in an action for partition are bound as fully as if they had been majors and personally cited. *Kromer v. Friday*, 10 Wash. St. 621.

<sup>271</sup> *Morenhout v. Higuera*, 32 Cal. 289.

<sup>272</sup> *Hastings v. Cunningham*, 35 Cal. 549; *Stewart v. Taylor*, 68 id. 5; *Cooke v. Aguirre*, 86 id. 479; *Etchepare v. Aguirre*, 91 id. 288; *Myers v. Moulton*, 71 id. 498; *Johnson v. Fraser*, 2 Idaho, 371; *Phipps v. Taylor*, 15 Oreg. 484; § 2473. *ante*.

<sup>273</sup> See Cal. Code Civ. Pro., §§ 514, 627, 667; *Nickerson v. Chatterton*, 7 Cal. 568; *O'Connor v. Blake*, 29 id. 312.

<sup>274</sup> *Muller v. Jewett*, 66 Cal. 216.

<sup>275</sup> Cal. Code Civ. Pro., § 582.

<sup>276</sup> Id., § 580; and see § 332, *ante*. The provisions of this section apply to *mandamus* and *quo warranto*. *People v. Board of Supervisors San Francisco Co.*, 27 Cal. 655.



of a referee.<sup>277</sup> A judgment on the report of a referee must be construed by the report.<sup>278</sup>

§ 4817. Decree of divorce.

*Form No. 1142.*

[TITLE.]

This cause having been brought on to be heard this ..... day of ....., 18.., upon the complaint of the plaintiff above named, and the answer and cross-complaint of the defendant above named, and upon the proofs taken in said action, and upon the report of L. M., the court commissioner of this court and referee in this cause, to whom it was referred to take proofs of the facts set forth in the complaint and answer and cross-complaint respectively, and to report the same to the court, and the said referee having taken the testimony by written questions and answers, and reported the same to the court, from which it appears that none of the material allegations of the complaint, except those expressly admitted in the answer, are sustained by testimony, and that all the material averments of the answer and cross-complaint are sustained by testimony free from all legal exceptions as to its competency, admissibility, and sufficiency; that said matter so alleged and proved in behalf of defendant are sufficient in law to entitle the defendant to the relief prayed for in his answer and cross-complaint; that plaintiff was a resident of this city and county at the time of commencing this suit, and that both plaintiff and defendant were residents of this state for a period of six months immediately prior thereto — on motion of G. H., counsel for the defendant, it is ordered, adjudged, and decreed that the court, by virtue of the power and authority therein vested, and in pursuance of the statute in such case made and provided, does order, adjudge, and decree that the marriage between the said plaintiff A. B. and the said defendant C. D. be dissolved, and the same is hereby dissolved accordingly, and the said parties are and each of them is freed and absolutely released from the bonds of matrimony, and all the obligations thereof; and it is further ordered, adjudged, and decreed that the defendant C. D. have, and he is hereby awarded, the sole charge, control, and custody of R. S. and T. U., the children, issue of said marriage, and

<sup>277</sup> Russell v. Elliott, 2 Cal. 245.

<sup>278</sup> Mason v. Ring, 2 Abb. Pr. (N. S.) 222; Commercial Bank of Albany v. Ten Eyck, 50 Barb. 9.

mentioned in said answer and cross-complaint, and that the said plaintiff surrender the said children to the said defendant.

**§ 4818. Decree of foreclosure and sale.**

*Form No. 1143.*

[TITLE.]

I. This cause having this day been brought on to be heard upon the complaint filed therein, taken as confessed by the defendant C. D. (whose default for not answering thereto has been duly entered), and upon the answers filed thereto by the defendants A. D. and E. P., and upon due proof of the filing of notice of the pendency of this action, containing the names of the parties to and the object of the action, and a description of the property affected thereby, upon the ..... day of ....., 18.., [the time of filing said complaint], in the office of the county recorder of the ..... county of ....., where said property is situated, and recording the same in said recorder's office, and upon the report of R. S., court commissioner of this court, which report is filed herein and is hereby confirmed, and the court having heard the proofs necessary to enable it to render judgment herein; and it appearing to the court from said report that there is now due to the plaintiff, from the said defendant C. D., for principal and interest upon the debt and mortgage mentioned and set forth in the complaint, the sum of ..... dollars, which sum is to draw and bear interest from the date hereof at the rate of ..... per cent. per month [or annum], and that all the allegations in the said plaintiff's complaint contained are true — now, on motion of E. F., of counsel for the plaintiff:

II. It is adjudged and decreed, that all and singular the mortgaged premises mentioned in the said complaint and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for the principal and interest, and costs in the suit and expense of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction, by or under the direction of the sheriff of the city and county of ....., where said mortgaged premises are situate; that said sale be made in said city and county; that the said sheriff give public notice of the time and place of such sale, according to the course and practice of the court and the law relative to sales of real estate under execution; and that the plaintiff or any of the parties to this suit may become the purchaser at such sale; and that the said sheriff,

after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale.

III. That the said sheriff, out of the proceeds of said sale, retain his fees, disbursements, and commissions on said sale, and pay to the plaintiff or his attorney, out of said proceeds, his costs in this suit, taxed at ..... dollars, and the sum of ..... dollars, fixed by said mortgage and allowed by the court as counsel fee of foreclosure, with interest thereon from this date, at the rate of ..... per cent. per month [or annum], and also the amount so found due as aforesaid to either, with interest thereon at the rate of ..... per cent. per month [or annum], from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same.

IV. That the defendant, and all persons claiming or to claim from or under him, and all persons having liens subsequent to said mortgage, by judgment or decree, upon the land described in said mortgage, and ..... or their personal representatives, and all persons having any lien or claim by or under such subsequent judgment or decree, and their heirs or personal representatives, and all persons claiming under them, and all persons claiming to have acquired any estate or interest in said premises subsequent to the filing of said notice of the pendency of this action with the recorder as aforesaid, be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said mortgaged premises, and every part and parcel thereof, from and after the delivery of the said sheriff's deed.

V. And it is further adjudged and decreed that the purchaser or purchasers of said mortgaged premises at such sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises, or any part thereof, and any person who since the commencement of this action has come into possession under them or either of them, deliver possession thereof to such purchaser or purchasers, on production of the sheriff's deed for such premises, or any part thereof.

VI. And it is further adjudged and decreed that if the moneys arising from the said sale shall be sufficient to pay the amount so found due to the plaintiff as above stated, with the interest and costs and expenses of sale, as aforesaid, the sheriff specify the amount of such deficiency and balance due the

plaintiff in his return of said sale, and that, on the coming in of said return, a judgment of this court shall be docketed for such balance against the defendant C. D., and that the defendant C. D., who is personally liable for the payment of the debt secured by the said mortgage, pay to the said plaintiff the amount of such deficiency and judgment, with interest thereon at the rate of . . . . . per cent. per month [or annum], from the date of said last-mentioned return and judgment; and that the plaintiff have execution therefor.

The description and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage referred to, or from the complaint filed in this action, are as follows, to-wit [describe it].

R. Q.,  
Superior Judge.

**§ 4819. Decree must contain.** All that a decree in a suit to foreclose a mortgage should contain is a statement of the amount due to the plaintiffs, a designation of the defendants who are personally liable for the payment of the debt, and a direction that the mortgaged premises, or so much thereof as may be necessary, be sold according to law, and the proceeds applied to the payment of the expenses of sale, the costs of the action, and the debt. Nothing further is required.<sup>279</sup> The decree concludes the rights of all parties to the action.<sup>280</sup>

**§ 4820. Personal judgment—relief from erroneous decree.** In California parties are at liberty to adopt, in the foreclosure of mortgages, the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal

<sup>279</sup> *Leviston v. Swan*, 33 Cal. 480; see, also, *Sichler v. Look*, 93 id. 601. It is expedient to insert that a writ of assistance may issue without further notice, since such a writ is part of the execution of the judgment. *Id.* As to the substance of a decree of foreclosure, consult *Rann v. Reynolds*, 11 Cal. 14; *Taggart v. San Antonio, etc., Co.*, 18 id. 460; *Boggs v. Hargrave*, 16 id. 559; 76 Am. Dec. 581; *Pechaud v. Riquet*, 21 Cal. 76; *San Francisco v. Lawton*, id. 589; and the early cases of *Moore v. Reynolds*, 1 id. 351; and *Harlan v. Smith*, 6 id. 173. The omission from the judgment foreclosing a mortgage of the name of a lienholder, who is a party defendant, is immaterial. *Sichler v. Look*, 93 Cal. 600; see *Brady v. Burke*, 90 id. 1.

<sup>280</sup> *Montgomery v. Middlemiss*, 21 Cal. 103; 81 Am. Dec. 146; *San Francisco v. Lawton*, 18 Cal. 463; 79 Am. Dec. 187.

obligation of the mortgagor, and directing a sale of the premises, and the application of the proceeds to its payment, and apply after sale for the ascertainment of any deficiency, and execution for the same; or they may take a formal judgment for the amount due in the first instance.<sup>281</sup> But a personal judgment is not a lien until after sale and deficiency.<sup>282</sup> Section 246 of the Practice Act limits the lien of a foreclosure judgment, or decree, whatever its form, to the mortgaged property until it is exhausted, and there can be no judgment lien upon other property until a deficiency is duly ascertained and docketed.<sup>283</sup> Courts of equity are ever ready to grant relief from their decrees.<sup>284</sup>

**§ 4821. Judgment enjoining maintenance of dam.**

*Form No. 1144.*

[TITLE.]

[Commence as in form No. 1145.]

Wherefore it is ordered, adjudged, and decreed that the defendants, and each of them, their servants, agents and employees be perpetually enjoined and restrained from maintaining, erecting, having, or keeping in the channel of . . . . . creek, at any point above the lands of plaintiff, and particularly at . . . . ., any dam or artificial obstruction. And it is further ordered, adjudged, and decreed that the permanent injunction of this court issue herein, directed to said defendants, their servants, agents, employees and attorneys, requiring them, and each of them, to perpetually refrain from having or keeping any dam or artificial obstruction in the channel of said stream, or from interfering with the free flow of the waters of said creek at any point above the plaintiff's lands aforesaid, and that plaintiff have judgment for his costs herein, taxed at the sum of . . . . . dollars.

[DATE.]

[SIGNATURE.]

<sup>281</sup> Cal. Code Civ. Pro., § 726, as amended in 1895; *Rowland v. Leiby*, 14 Cal. 156; *Englund v. Lewis*, 25 id. 348; *Chapin v. Broder*, 16 id. 403; see *Toley v. Railroad Co.*, 98 id. 490.

<sup>282</sup> Cal. Code Civ. Pro., § 726; *Culver v. Rogers*, 28 Cal. 520.

<sup>283</sup> *Well v. Howard*, 4 Nev. 384. Deficiency judgment after foreclosure. See *Black v. Gerichten*, 58 Cal. 56; *Blumberg v. Birch*, 99 id. 416; *La Societe, etc. v. Weldmann*, 97 id. 507; *Batchelder v. Brickell*, 75 id. 373.

<sup>284</sup> *Goodenow v. Ewer*, 16 Cal. 461; 76 Am. Dec. 540. As to how relief may be sought in such cases, consult *Boggs v. Hargrave*, 16 Cal. 559; 76 Am. Dec. 561; *Raun v. Reynolds*, 15 Cal. 468; *Burton v. Lies*, 21 id. 87; and *Leviston v. Swan*, 33 id. 480.

**§ 4822. Decree in actions to quiet title.***Form No. 1145.***[TITLE.]**

This cause having been regularly called and tried by the court, and the findings of fact and conclusions of law, and the decision thereon in writing, having been duly rendered by the court, which are now on file in this cause, wherein judgment was awarded in favor of A. B., plaintiff, against all of the defendants, and for costs against such of the defendants only as have answered contesting the plaintiff's rights in the premises, on motion of E. F., plaintiff's attorney:

It is now, therefore, hereby ordered, adjudged, and decreed that the plaintiff have judgment, as prayed for in his complaint herein, against the defendants, and each and all of them; that all adverse claims of the defendants, and each of them, and all persons claiming or to claim said premises, or any part thereof, through or under said defendants, or either of them, are hereby adjudged and decreed to be invalid and groundless; and that the plaintiff be and he is hereby declared and adjudged to be the true and lawful owner of the land described in the complaint, and hereinafter described, and every part and parcel thereof, and that his title thereto is adjudged to be quieted against all claims, demands, or pretensions of the defendants or either of them, who are hereby perpetually estopped from setting up any claims thereto, or any part thereof. Said premises are bounded and described as follows [here describe the premises].

And it is hereby further ordered, adjudged, and declared that the plaintiff do have and recover his costs, hereby taxed at ..... dollars, against the following-named defendants.

**[DATE.]****[SIGNATURE.]**

**§ 4823. Effect of decree.** If plaintiff prevail in an action to quiet title, a decree inserted in the judgment, enjoining defendant from making any further contest on plaintiff's title, even if not strictly correct, does not injure defendant. Such decree does not preclude defendant from availing himself of an acquired title.<sup>285</sup>

**§ 4823a. Judgment of divorce — when operative, etc.** A judgment of divorce is effective to dissolve the marriage tie when the order for judgment is rendered and entered upon the min-

<sup>285</sup> Reed v. Calderwood, 32 Cal. 109. As to effect of decree, see Marshall v. Shafter, id. 176.

utes, and the failure or neglect of the plaintiff to have the judgment entered will not affect its validity, it being the duty of the clerk to make the entry at any time after the rendition, and the entry being but the evidence of the judgment already in operation and effect.<sup>286</sup> If it be made to appear that fraud has been practiced on the defendant and the court in procuring the decree of divorce it will be promptly set aside.<sup>287</sup> Courts of general jurisdiction have this inherent power independent of any statutory provisions.<sup>288</sup>

§ 4823b. Judgment in ejectment — effect. A judgment in ejectment in no manner vacated, and from which no valid appellate proceeding is prosecuted, remains a conclusive and final judgment directly affecting the estate, and binding upon the parties and all claiming under them.<sup>289</sup>

§ 4823c. Judgment in action against an estate. It is erroneous in an action against an estate to enter judgment against the administrator personally, or to award execution. A judgment against an administrator should be *de bonis testatoris*.<sup>290</sup>

§ 4823d. Judgment in action on bond. At common law, it was the practice in actions on penal bonds to enter judgment for the full amount of the penalty to be discharged upon payment of the damages. But under Code procedure, a judgment for the amount of the damages is improper form.<sup>291</sup>

§ 4823e. Judgment — proper on sustaining plea. Where a plea of the pendency of a former action is sustained, the proper judgment to be entered is one abating the subsequent action, and not a judgment that the plaintiff take nothing thereby.<sup>292</sup>

§ 4823f. Judgment — failure to answer. Where an answer is filed which does not controvert the material allegations of the

<sup>286</sup> *In re Cook*, 83 Cal. 415; *In re Newman*, 75 id. 213; 7 Am. St. Rep. 146; and see § 4758, *ante*.

<sup>287</sup> *Morton v. Morton*, 16 Col. 358.

<sup>288</sup> *Yorke v. Yorke*, 3 N. Dak. 343.

<sup>289</sup> *Hurd v. McClellan*, 1 Col. App. 327. It is the duty of the court in such case to put the successful party into possession of the property. *Id.*

<sup>290</sup> *Mattison v. Childs*, 5 Col. 78; *Jones v. Perot*, 19 id. 141; and see *Cooper v. De Mainville*, 1 Col. App. 16.

<sup>291</sup> *Allen v. King*, 4 Col. App. 319.

<sup>292</sup> *Conbrough v. Adams*, 70 Cal. 374.



complaint, the plaintiff is entitled to a judgment for failure to answer, although the plaintiff may have filed a reply to the defective answer.<sup>293</sup>

**§ 4824. Judgment on verdict.**

*Form No. 1146.*

**[TITLE.]**

This day this action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons were regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing evidence, the argument of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and being called, answered to their names, and say they find a verdict for the plaintiff.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered and adjudged that said plaintiff have and recover from said defendant the sum of ..... dollars, with interest thereon at the rate of ..... per cent. per month, from the date hereof till paid, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of ..... dollars.

Judgment rendered, ....., 18..

**§ 4825. Entry by clerk.** When trial by jury has been had, judgment shall be entered by the clerk in conformity to the verdict within twenty-four hours, unless the court order the cause to be reversed for argument, or further consideration, or grant a stay of proceedings.<sup>294</sup> Where there is no question as to the proper judgment to be entered on a verdict, the judgment should be entered at once, without waiting for a motion for new trial.<sup>295</sup> If the verdict of the jury fails to find the lien, the

<sup>293</sup> Port v. Parfit, 4 Wash. St. 369.

<sup>294</sup> Cal. Code Civ. Pro., § 664; see § 4758, *ante*.

<sup>295</sup> Hutchinson v. Bours, 13 Cal. 51. A judgment can be rendered upon a special verdict only when it is inconsistent with the general verdict. Obersteller v. Assurance Co., 96 Cal. 645. No judgment can be entered on a general verdict rendered by a jury in an equity case, and a judgment thus entered will be reversed for a failure of the court to find upon the issues. Learned v. Castle, 67 Cal. 41. The fact that the delay to enter the judgment upon the verdict was the delay of the clerk, and not of the court, does not affect the right to have the judgment entered *nunc pro tunc*. Marshall v. Taylor, 97



court can not render a judgment essentially different from the verdict, and the judgment so far will be reversed.<sup>296</sup> The court will presume after a verdict that facts imperfectly alleged in a complaint have been proved, but it will not presume that a material fact, not at all stated, has been proved.<sup>297</sup>

§ 4826. Satisfaction of judgment.

Form No. 1147.

[TITLE.]

For and in consideration of the sum of ..... dollars, to me paid by ....., the defendant in the above-entitled action, full satisfaction is hereby acknowledged of a certain judgment rendered in said ..... court in the said action, on the ..... day of ....., A. D. 18.., in favor of ....., the plaintiff in the said action, and against the said defendant, for the sum of ..... dollars, with interest thereon from the ..... day of ....., A. D. 18.., at the rate of ..... per cent. per month until paid, together with said plaintiff's costs and disbursements, amounting to the sum of ..... dollars, and recorded in book ..... of Judgments, at page ..... And I hereby authorize the clerk of said court to enter satisfaction of record of said judgment in the said action.

E. F.,

Attorney for Plaintiff

[DATE.]

§ 4827. By levy under execution. A levy under execution on sufficient property to satisfy it is a satisfaction of the judgment.<sup>298</sup> The return of a sheriff indorsed on an execution placed in his hands for collection, that the execution is satisfied by promissory notes received for the amount due on it, is not

Cal. 422; see § 4758, *ante*. *Judgment non obstante veredicto*.—A judgment *non obstante veredicto* is always upon the merits, and is never granted but in a very clear case, as where it is apparent to the court from the defendant's own plea that he can have no merits. *Friendly v. Lee*, 20 Oreg. 202. Where allegations in an answer which constitute a complete defense to the plaintiff's cause of action are not denied by the reply, judgment will be rendered for the defendant notwithstanding a verdict for the plaintiff. *Agricultural Works v. Creighton*, 21 Oreg. 495.

<sup>296</sup> *Walker v. Hauss-Hijo*, 1 Cal. 186.

<sup>297</sup> *Barron v. Frink*, 30 Cal. 486.

<sup>298</sup> *People v. Chisholm*, 8 Cal. 30; see, also, *Mulford v. Estudillo*, 23 id. 95; see Cal. Code Civ. Pro., § 675.

evidence of the satisfaction of the judgment on which it was issued, nor can it be admitted in evidence as tending to prove a satisfaction of the same.<sup>299</sup> The plaintiff in an execution may accept of promissory notes by a special agreement, as an absolute payment of the same, but the agreement must be proved by testimony other than the sheriff's certificate.<sup>300</sup>

**§ 4828. Part payment.** A payment of part of the amount due upon a money judgment, under an agreement that it shall operate as satisfaction in full, will not discharge the judgment.<sup>301</sup> The contrary is now, however, the rule in California.<sup>302</sup>

**§ 4828a. Judgments — validity; of — generally.** Every presumption is in favor of the correctness of the judgment of a court of general jurisdiction until the contrary is made affirmatively to appear.<sup>303</sup> Jurisdiction having been once acquired over the parties and the subject-matter, every presumption is in favor of the legality of the judgment.<sup>304</sup> A judgment is void on its face only when that fact is made apparent by an inspection of the judgment-roll.<sup>305</sup> As a rule, a judgment of a court of general jurisdiction is void in no case except when it appears from the record itself that the court, in pronouncing it, acted

<sup>299</sup> *Mitchell v. Hockett*, 25 Cal. 542; 85 Am. Dec. 151.

<sup>300</sup> *Id.*; and see *Smith v. Reed*, 52 Cal. 345.

<sup>301</sup> *Deland v. Hlett*, 27 Cal. 611; 87 Am. Dec. 102.

<sup>302</sup> See Cal. Civil Code, §§ 1521-1543; see, also, *Fuller v. Baker*, 48 Cal. 632. Payment of a judgment operates as an irrevocable discharge, after which the judgment can not be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements. *Estate of Baby*, 87 Cal. 200. One plaintiff is only authorized to enter satisfaction of the judgment without the consent of his coplaintiff on payment of the whole amount of the judgment. *Haggin v. Clark*, 61 Cal. 1. If satisfaction of a judgment is entered without notice to the judgment creditor the latter has his remedy by motion to set aside the order and entry of satisfaction. *Thomas v. Mining Co.*, 54 Cal. 578. Injunction will lie to restrain the enforcement of a satisfied judgment. *Thompson v. Laughlin*, 91 Cal. 314.

<sup>303</sup> *Kent v. Insurance Co.*, 2 S. Dak. 300; *Renig v. Hecht*, 58 Wis. 212; *Credit Foncier v. Rogers*, 10 Neb. 184.

<sup>304</sup> *Blake v. Manufacturing Co.*, 77 N. Y. 626; and, to same effect, *Caruthers v. Hensley*, 90 Cal. 559; *Crim v. Kessing*, 89 *id.* 478; *Piper v. Packer*, 20 Minn. 274; *Jones v. Adams*, 19 Nev. 78; *Thompson v. Lake*, *id.* 293; *Murphy v. King*, 6 Mont. 30; *McMillan v. Carter*, 6 *id.* 215; *Clark v. Baker*, *id.* 153.

<sup>305</sup> *People v. Thomas*, 101 Cal. 571; *People v. Harrison*, 84 *id.* 607; *People v. Temple*, 106 *id.* 447.

without jurisdiction.<sup>306</sup> The mere absence of findings does not render a judgment void in any case.<sup>307</sup> And in no case will a judgment be disturbed for immaterial error.<sup>308</sup> But a judgment for the plaintiff obtained through a clear departure from the issues joined can not be sustained.<sup>309</sup> Nor can a judgment rendered against a garnishee without affirmative proof of indebtedness be sustained.<sup>310</sup> On an application for a writ of *habeas corpus* the judgment under which the prisoner is held is a unit, and if one portion of it is without the jurisdiction of the court which made it the whole is void.<sup>311</sup> Judgment rendered against a party to an action after his death is not void on its face. Proceedings must be taken to set aside the judgment before an application for a *mandamus* can be made by the administrator of the decedent to compel the court to substitute him as a party to the action.<sup>312</sup> Where in an action against a firm composed of two persons, the jury renders a general verdict only, in favor of plaintiff and against defendant, it is error for the court, while such verdict remains in the record, to render judgment against the plaintiff, dismissing the action as to one member of the firm, with costs.<sup>313</sup> A party accepting and retaining the fruits of a void judgment is estopped from assailing the judgment itself. As to him such a judgment has the same force and effect as a valid judgment.<sup>314</sup>

§ 4828b. **Judgments — impeachment — relief against.** A judgment rendered without obtaining jurisdiction of the person may be impeached by a proceeding in equity, or by answer to an action, where equitable defenses are allowable.<sup>315</sup> A party is entitled to equitable relief against a judgment procured by fraud. But such relief will not be granted, unless the party seeking it has been free from negligence.<sup>316</sup> And the assist-

<sup>306</sup> *Great West. Min. Co. v. Mining Co.*, 14 Col. 90.

<sup>307</sup> *In re Cook*, 77 Cal. 220; 11 Am. St. Rep. 267.

<sup>308</sup> *Tulloch v. Skein Works*, 17 Col. 579.

<sup>309</sup> *Jackson v. Ackroyd*, 15 Col. 583.

<sup>310</sup> *Un. Pac. Ry. Co. v. Gibson*, 15 Col. 299.

<sup>311</sup> *Ex parte Kelly*, 65 Cal. 154.

<sup>312</sup> *Elliott v. Patterson*, 65 Cal. 109. A judgment in favor of a dead man is a nullity. *McCreery v. Everding*, 44 Cal. 284.

<sup>313</sup> *Kellogg v. Gilman*, 3 N. Dak. 538.

<sup>314</sup> *Denver, etc., Water Co. v. Middaugh*, 12 Col. 434; *Kille v. Town of Yellowhead*, 80 Ill. 208; *Hitchcock v. Railroad Co.*, 25 Conn. 516.

<sup>315</sup> *Wilson v. Hawthorne*, 14 Col. 530.

<sup>316</sup> *Champion v. Woods*, 79 Cal. 17.

ance of equity can not be invoked so long as the remedy by motion exists.<sup>317</sup> And in order to obtain equitable relief against a judgment alleged to have been fraudulently obtained, it must be averred and shown that there is a valid defense on the merits.<sup>318</sup> So, the frauds for which equity grants relief against judgments are those which are extrinsic, or collateral to the matter examined in the first suit.<sup>319</sup> The fact that the right of appeal was lost by the inadvertence of the clerk of the plaintiff's attorney in failing to file an undertaking on appeal in proper time is not a ground for relief in equity.<sup>320</sup> But it does not affect the question of the right of a party to equitable relief against a void judgment that an attorney having no authority appeared for him in the action.<sup>321</sup>

§ 4828c. **Erroneous judgment — remedy.** Under Washington practice, where a judgment, erroneous but not void, has been entered against a party, he should either appeal, or apply to the court in the manner and within the time prescribed by law to have it set aside. After the expiration of the time prescribed, the district judge has no power to vacate or modify the judgment.<sup>322</sup>

§ 4828d. **Vacating or setting aside.** A court of equity will never set aside a judgment for mere error, whether of law or fact, committed in the rendition of the judgment.<sup>323</sup> When an action is brought in a court of equity to set aside a judgment at law, the attack, although not collateral, is always indirect, and

<sup>317</sup> *Ede v. Hazen*, 61 Cal. 360; compare *Land & Water Co. v. Flash*, 97 id. 610.

<sup>318</sup> *Eldred v. White*, 102 Cal. 600; *White v. Crow*, 110 U. S. 183. Sufficient statement of meritorious defense. *Lan Syne Min. Co. v. Ross*, 20 Nev. 127.

<sup>319</sup> *In re Griffith*, 84 Cal. 107.

<sup>320</sup> *Daly v. Pennie*, 86 Cal. 553.

<sup>321</sup> *Baker v. O'Riordan*, 65 Cal. 368.

<sup>322</sup> *Hawks v. Votaw*, 1 Wash. St. 70; see, also, *Bowman v. McGregor*, 6 id. 118; *Seattle, etc., Railway Co. v. Johnson*, 7 id. 97; *Putnam v. Webb*, 15 Oreg. 440. Correction of errors in judgment. See § 4791, *ante*.

<sup>323</sup> *Wickersham v. Comerford*, 104 Cal. 494; and see *In re Griffith*, 84 id. 107. Vacation for fraud or deceit. *Yorke v. Yorke*, 3 N. Dak. 343; § 4793, *ante*; *Bent v. Maxwell*, 3 N. Mex. 158; *Lang Syne Min. Co. v. Ross*, 20 Nev. 128; *Thompson v. Railway Co.*, 3 N. Mex. 269. See, also, as to equitable relief against judgment, *Merriman v. Walton*, 105 Cal. 408; *Sears v. Hicklin*, 13 Col. 143.

such an attack does not question or dispute the effect of the judgment as an adjudication, but seeks to be relieved from its operation upon equitable grounds.<sup>324</sup> The Colorado statute (Code Civ. Pro., § 75) authorizes the court under certain specified circumstances, at any time within six months after adjournment of the term, to relieve a party from a judgment, order or proceeding taken against him through mistake, inadvertence, surprise or excusable neglect.<sup>325</sup> Similar statutory provisions likewise exist in other states.<sup>326</sup> An application to set aside a judgment in any such case is directed to the sound legal discretion of the trial court, and an order granting the application will not be reversed on appeal unless it clearly appears that the court abused its discretion.<sup>327</sup> A motion will not lie to vacate a judgment after the lapse of the time limited by statute, if the judgment is not void on its face, and in all cases, after the lapse of such time, when the attempt is made to vacate the judgment by a proceeding in court for that purpose, an action regularly brought is preferable, and should be required.<sup>328</sup> A judgment void on its face is one that appears to be void by inspection of the judgment-roll, and it is only such a judgment that can be attacked either directly or collaterally, without reference to the lapse of time.<sup>329</sup> An application to vacate a judgment for want of service of summons upon or appearance of a defendant, is not matter of discretion, but of pure legal right, and does not arise under section 473, California Code of Civil Procedure.<sup>330</sup>

<sup>324</sup> *Elchhoff v. Elchhoff*, 107 Cal. 42.

<sup>325</sup> See *Clark v. Perry*, 17 Col. 56; *Directory Co. v. App*, 4 Col. App. 350.

<sup>326</sup> See Utah Comp. Laws. 1888, § 3256; Cal. Code Civ. Pro., § 473; Oregon (Hill's Code), § 102; *Thomas v. Morris*, 8 Utah, 284; *Yerkes v. Henry*, 6 Dak. 5; *Warder v. Patterson*, id. 83.

<sup>327</sup> *Buell v. Emerich*, 85 Cal. 116; *O'Connor v. Ellmaker*, 83 id. 452; *Pearson v. Fishing Co.*, 99 id. 425; *Dusy v. Prudom*, 95 id. 646; *Hicklin v. McClear*, 19 Col. 508; *Malone v. Mining Co.*, 93 Cal. 384; *Livesley v. O'Brien*, 6 Wash. St. 553; *Bozzio v. Vaglio*, 10 id. 270.

<sup>328</sup> *People v. Harrison*, 84 Cal. 607, 611.

<sup>329</sup> Id.; *Brown v. Wilson*, 21 Col. 309; and see *Jacks v. Baldez*, 97 Cal. 91; *People v. Temple*, 103 id. 447; *Eldred v. White*, 102 id. 600; compare *Hill v. Cab Co.*, 79 id. 191; *People v. Harrison*, 107 id. 541; *People v. Thomas*, 101 id. 571.

<sup>330</sup> *Hunter v. Bryant*, 98 Cal. 247; *Norton v. Railroad Co.*, 97 id. 388. If parties stipulate or admit that there was in fact no service of summons, it is the duty of the court to declare the judgment void, as matter of law, upon the admitted facts. *People v.*

§ 4828e. **Judgment — collateral attack.** When a court has acquired jurisdiction, its subsequent proceedings, however irregular, are not void. The record of the court is conclusive as to all matters decided by it, and no evidence can be received to contradict it upon a collateral attack.<sup>331</sup> The main difference between collateral and direct attacks upon a judgment, in respect of the judgment and its recitals, is, that upon a collateral attack the record alone can be inspected, and it is conclusively presumed to be correct, while on a direct attack the true facts may be shown in contradiction of the record, and thus the judgment itself on appeal may be reversed or modified.<sup>332</sup> But the judgment and its recitals will be presumed to be correct upon appeal unless the contrary is made to appear.<sup>333</sup> A motion to vacate a judgment on the ground that it is void is a direct and not a collateral attack.<sup>334</sup> The judgment or decree of a court having jurisdiction to pronounce the same is in respect to the matter directly determined, or actually and necessarily included therein, conclusive upon the parties and those asserting subsequent claims under them and can not be collaterally attacked.<sup>335</sup> The courts of the United States being courts of superior jurisdiction, their decrees are not open to collateral attack, unless it is affirmatively shown by the record that they had no jurisdiction.<sup>336</sup>

Harrison, 107 Cal. 541. Setting aside judgment on ground of surprise, etc., see *Donnelly v. Clark*, 6 Mont. 135; *Lowell v. Ames*, id. 187. Vacation of void judgment. See *Beach v. Beach*, 6 Dak. 371; *Hanswith v. Sullivan*, 6 Mont. 203; *McEachern v. Brackett*, 8 Wash. St. 652. Procedure on vacating judgment. See *Wheeler v. Moore*, 10 Wash. St. 309; *Whidby Land, etc., Co. v. Nye*, 5 id. 301. Party must proceed with diligence. *Bozzio v. Vaglio*, 10 Wash. 270; *Darke v. Ireland*, 4 Utah, 192; *Heine v. Treadwell*, 72 Cal. 217; *Brackett v. Banegas*, 99 id. 623. Modification of judgment. See *State v. Superior Court*, 8 Wash. St. 591; *Tacoma Lumber, etc., Co. v. Wolff*, 7 id. 478.

<sup>331</sup> *Ex parte Sternes*, 77 Cal. 156; *Harnish v. Bramer*, 71 id. 156; and see *Edgerton v. Edgerton*, 12 Mont. 122; 33 Am. St. Rep. 557.

<sup>332</sup> *Lyons v. Roach*, 84 Cal. 27; see *Morrill v. Morrill*, 20 Oreg. 96; 23 Am. St. Rep. 95.

<sup>333</sup> Id.; and see *Sichler v. Look*, 93 id. 600.

<sup>334</sup> *Reinhart v. Luzo*, 86 Cal. 395; 21 Am. St. Rep. 52; and see *People v. Mullan*, 65 Cal. 396.

<sup>335</sup> *Finley v. Houser*, 22 Oreg. 562; see, also, *North Pacific Cycle Co. v. Thomas*, 26 id. 381; *Berry v. King*, 15 id. 165; *Vantilburgh v. Black*, 2 Mont. 371.

<sup>336</sup> *Applegate v. Dowell*, 15 Oreg. 513; 17 id. 300; see *Dowell v. Applegate*, 152 U. S. 334; reversing S. C., 24 Oreg. 440.

§ 4828f. *Res adjudicata*. It is a well-recognized doctrine that a matter decided by a court of competent jurisdiction can not be contested again between the same parties.<sup>337</sup> Nor is there any difference in this respect between a verdict and judgment at common law, and a decree of a court of equity.<sup>338</sup> And the fact that a judgment in a former action between the same parties, which determined the same points as those raised in the latter action, was erroneous under the law as subsequently declared by the appellate court in other cases between other parties, does not affect its force as an adjudication of the rights of the parties thereto, and those in privity with them.<sup>339</sup> But a judgment rendered in a prior action can not be a bar to the prosecution of a subsequent action, so long as the time for appeal from the prior judgment has not expired, or it remains undetermined on appeal.<sup>340</sup> And where a judgment in a former action, relied on as a bar, is not set forth in the record on appeal, it can not be held to have constituted such a bar.<sup>341</sup> A judgment against one trespasser which has not been satisfied is not a bar to a suit against another trespasser to recover for the same wrong.<sup>342</sup>

§ 4828g. *Stare decisis* — law of case. *Stare decisis* is the policy of the courts, and the principle upon which rests the authority of judicial decisions as precedents in subsequent litigation. And this doctrine is not to be departed from, except when subsequent examination shows the case to have been decided contrary to principle.<sup>343</sup> But a decision is not even authority, except upon the point actually passed upon by the court and directly involved in the case.<sup>344</sup> And expressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and can not be safely applied in their largest and most universal sense to dissimilar

<sup>337</sup> See *Dunstan v. Higgins*, 138 N. Y. 70; 34 Am. St. Rep. 431; and cases cited. § 4753, *ante*.

<sup>338</sup> *Robbins v. Collier*, 3 N. Mex. 231; see *Farquar v. Farquar*, 20 Oreg. 69.

<sup>339</sup> *People v. Holladay*, 93 Cal. 241; 27 Am. St. Rep. 186.

<sup>340</sup> *Story v. Story*, 100 Cal. 41; *Brown v. Campbell*, 100 id. 635.

<sup>341</sup> *Allin v. Williams*, 97 Cal. 403.

<sup>342</sup> *Hattersley v. Burrows*, 4 Col. App. 538; see § 174, *ante*.

<sup>343</sup> *State v. Clark*, 9 Oreg. 466; and see *Paulson v. Portland*, 16 id. 450; *Lux v. Haggin*, 69 Cal. 255; *Estate of Dorris*, 93 id. 611; *Emery v. Reed*, 65 id. 351; *Allen v. Allen*, 95 id. 184.

<sup>344</sup> *Norris v. Moody*, 84 Cal. 143.



cases.<sup>345</sup> When the law governing a case has been once declared by the opinion of an appellate court on a direct appeal or writ of error, such opinion, on the retrial of the same case upon the same state of facts, is *res adjudicata*, and is declared to be higher authority than *stare decisis*, so far as the particular action is concerned.<sup>346</sup> The decision of the appellate court becomes the law of the case, and upon a second appeal, is binding upon the court and the parties, and from which the court is not at liberty to depart.<sup>347</sup>

§ 4828h. **Judgments — actions on.** In an action to restrain the enforcement of a voidable judgment, the complaint must show that the plaintiff had a good defense to the action in which the judgment was rendered. Such a defense is sufficiently shown, however, in the absence of a special demurrer, by an allegation that at the time of the entry of the judgment the defendant had no cause of action against the plaintiff.<sup>348</sup> In an action by a junior creditor to set aside a prior judgment and execution sale of the property of the debtor on the ground of fraud, the complaint need not allege that an execution had been issued and returned unsatisfied, where it is averred that the judgment debtor has not and never had any property except that sold under the fraudulent judgment.<sup>349</sup> In an action on a foreign judgment the only question to be tried is the validity of the proceedings of the foreign court, the question of liability on the original case not being involved.<sup>350</sup> In such action it is competent collaterally to impeach the judgment by extrinsic evidence, showing want of jurisdiction in the court pronouncing the judgment, notwithstanding a recital in the record of the judgment of the existence of jurisdictional facts.<sup>351</sup> A statute of

<sup>345</sup> *Pasadena v. Stimson*, 91 Cal. 238; *Coburn v. Brooks*, 78 Id. 443.

<sup>346</sup> *Lee v. Stahl*, 13 Col. 174; see *People v. Holladay*, 93 Cal. 241; *Palmer v. Railway Co.*, 2 Idaho, 350.

<sup>347</sup> *Applegate v. Dowell*, 17 Oreg. 299; *Porter v. Muller*, 112 Cal. 355.

<sup>348</sup> *Harnish v. Bramer*, 71 Cal. 155.

<sup>349</sup> *Terney v. Doten*, 70 Cal. 398. Sufficiency of complaint in action on judgment. See § 784, *ante*. Insufficiency of complaint in action on money judgment. *Hogan v. Kyle*, 7 Wash. St. 595.

<sup>350</sup> *Foshier v. Narver*, 24 Oreg. 441; 41 Am. St. Rep. 874. Insufficient complaint in action on foreign judgment. *Cougill v. Insurance Co.*, 25 Oreg. 360. Answer sufficiently alleging want of jurisdiction. *Aultman v. Mills*, 9 Wash. St. 68.

<sup>351</sup> *Greenweig v. Strelinger*, 103 Cal. 278; *Aultman v. Mills*, 9 Wash. St. 68; see *Ritchie v. Carpenter*, 2 Wash. St. 512; 26 Am. St. Rep. 877.



another state prohibiting action on a judgment obtained in one of its courts, unless leave of court is first obtained, affects the remedy merely, and does not apply to an action on such judgment in a court of the state of Washington.<sup>352</sup>

§ 4829. Memorandum of costs and disbursements.

Form No. 1148.

[TITLE.]

DISBURSEMENTS.

Sheriff's fees .....	\$15 00
Clerk's fees .....	20 00
Witnesses' fees .....	46 00

[Names of witnesses must be given.]

Rerefee's fees .....	50 00
Notary fees .....	10 00

\$141 00

State of California, }  
City and County of ..... } ss.:

E. F., being duly sworn, deposes and says:

I. That he is one of the attorneys for the plaintiff in the above-entitled action, and as such is better informed relative to the above costs and disbursements than the said plaintiff.

II. That the items in the above memorandum contained are correct to the best of said affiant's knowledge and belief, and that the said disbursements have been necessarily incurred in the said action.

[JURAT.]

[SIGNATURE.]

§ 4830. Affidavit. The affidavit by the attorney of the party accompanying the bill of costs is good under the statute.<sup>353</sup>

<sup>352</sup> Weber v. Yancy, 7 Wash. St. 84.

<sup>353</sup> See Cal. Code Civ. Pro., § 1033; Morris v. Rodgers, 26 Oreg. 577. Any one who has knowledge of the facts may verify the memorandum. Yorba v. Dobner, 90 Cal. 337. And a verified bill of costs, properly filed, is *prima facie* evidence that the items thereof have been necessarily incurred. San Francisco v. Collins, 98 Cal. 259; and see Barnhart v. Kron, 88 id. 447; Gould v. Elevator Co., 3 N. Dak. 96. If the affidavits relating to the taxation of costs are conflicting, and some of the items relate to facts of which the court has actual knowledge, its ruling will not be disturbed. Fanning v. Leviston, 93 Cal. 186; and see Hoyt v. Smelting Co., 90 id. 339. If a party entitled to costs neglects to serve and file his memorandum

§ 4831. **Attorney's fees.** The measure and mode of compensation of attorneys and counselors shall be left to the agreement, express or implied, of the parties. But parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided.<sup>354</sup> In foreclosure cases, counsel fees are allowed by the court where there is a stipulation in the mortgage for counsel fees.<sup>355</sup> An attorney has no lien upon a judgment recovered by him in favor of his client for a *quantum meruit* compensation for his services. Such lien extends only to costs given by statute.<sup>356</sup>

§ 4832. **Retaxing costs.** If items are included in the bill of costs which are not properly taxable, it affords no just ground for refusing to issue an execution or recalling one, but the remedy is by motion to retax.<sup>357</sup> If the court adds to the judgment

thereof until more than five days have elapsed after he has knowledge of the decision of the court, though no written notice of it has been served upon him, the filing is too late, and the costs will be stricken from the judgment on motion. *Dow v. Ross*, 90 Cal. 562; *Mullally v. Benevolent Soc.*, 69 id. 559. And a cost bill filed before the filing of the findings and entry of judgment, is filed before the time authorized by law, and should be stricken out on motion. *Sellick v. De Carlow*, 95 Cal. 644. Filing and service of cost bill. See *Riddell v. Harrell*, 71 Cal. 254; *Thompson v. Brannan*, 76 id. 618. Time for filing objections to cost bill under Oregon Code. See *Hislop v. Moldenhauer*, 24 Oreg. 106; *Walker v. Goldsmith*, 16 id. 161.

<sup>354</sup> Cal. Code Civ. Pro., § 1021. Costs are taxable only by force of statute. *Board of Commissioners v. Lee*, 3 Col. App. 177. But the recovery of costs both in actions at law and suits in equity may be regulated by statute. *Kinnear v. Flanders*, 17 Col. 11. The statute as to costs in existence at the time of rendition of judgment will control the question. *Hepworth v. Gardner*, 4 Utah, 439. The statute is to be strictly construed. *Jackson v. Biglin*, 10 Oreg. 93. Erroneous judgment for attorney fees in dismissal of action of ejectment. See *Mason v. McLean*, 6 Wash. St. 31.

<sup>355</sup> See Stat. 1874, p. 707; see, also, *Sichel v. Carrillo*, 42 Cal. 494; *Patterson v. Donner*, 48 id. 380; and Cal. Code Civ. Pro., § 1500.

<sup>356</sup> *Ex parte Kyle*, 1 Cal. 331. A lien of the attorney for his costs was settled by this court in *Ex parte Kyle*, *supra*; and *Mansfield v. Dorland*, 2 id. 517; and not allowed; *Russell v. Conway*, 11 id. 103; *Hogan v. Black*, 66 id. 41.

<sup>357</sup> *Meeker v. Harris*, 23 Cal. 286; see *Burnham v. Hays*, 3 id. 115; 58 Am. Dec. 389; *Petty v. County Court*, 45 Cal. 245. The clerk of the court has no authority to enter a judgment for costs while a motion to retax is pending. *Lumber Co. v. Supervisors*, 71 Cal. 268. Costs are not a part of the judgment rendered in a cause, and can not be retaxed in the Supreme Court, unless there was a motion for

the costs of the prevailing party, after the time for filing the same has expired, and after an appeal has been perfected, the error can only be corrected by an appeal from the order.<sup>358</sup> Where costs on appeal to the Supreme Court are not entered on the judgment docket in the court below, they do not become a lien on property until the levy of an execution.<sup>359</sup>

**§ 4833. Costs, when allowed — allowance, when discretionary.** The allowance of costs rests in discretion of the court of original jurisdiction. And where, on sustaining a demurrer to a complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action, the court gave judgment for the defendant for full costs, including a jury fee, it was held no such abuse of discretion as to warrant interference by the Supreme Court.<sup>360</sup> The Supreme Court will only review the ruling of an inferior court in the matter of costs upon an appeal from the judgment in the case.<sup>361</sup>

**§ 4834. In particular cases — claim and delivery.** In an action to recover possession of personal property, if the plaintiff takes

retaxation denied in the court below. *Burrichter v. Cline*, 3 Wash. St. 135; see § 4841, *post*.

<sup>358</sup> *Jones v. Frost*, 28 Cal. 245.

<sup>359</sup> *Chapin v. Broder*, 16 Cal. 403.

<sup>360</sup> *Harvey v. Chilton*, 11 Cal. 119. A court may, in its discretion, grant a nonsuit without requiring payment of the costs. *Mitchell v. Downing*, 23 Oreg. 448. Discretion of court as to costs in divorce proceedings. See *Lee v. Lee*, 3 Wash. St. 236. The discretion to "order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require" (Cal. Code Civ. Pro., § 1720), can not be exercised until a decision has been made in the contest upon which the discretion may be based. *Henry v. Superior Court*, 93 Cal. 569.

<sup>361</sup> *Votan v. Reese*, 20 Cal. 90. Where there is nothing in the record to show that the trial court did not properly exercise its discretion in refusing to strike out certain items objected to upon motion to retax the costs, its order will be affirmed. *Barnhart v. Kron*, 88 Cal. 446; compare *Miller v. Ditch Co.*, 91 id. 103. By failing to present the question of costs for review on a bill of exceptions, any objection to the costs in the judgment is waived. *Muir v. Meredith*, 82 Cal. 19; *People v. Marin County*, 103 id. 223. An erroneous order *after* final judgment, relating to costs, can only be considered upon an appeal from such order. *Crane v. Forth*, 95 Cal. 88. Waiver of right to costs. See *Cantwell v. McPherson*, 2 Idaho, 1044. As to when costs are allowed of course, see Cal. Code Civ. Pro., §§ 1022-1026; *Purvis v. Kroner*, 18 Oreg. 414.

the property at the commencement of the action, and the defendant prays a return of it, and the defendant was entitled to the property at the commencement of the action, but his right has ceased and vested in the plaintiff before trial, the judgment should leave the property in plaintiff's possession; but award costs to defendant.<sup>362</sup>

§ 4835. **Clerk's duty.** Within two days after the costs are taxed or ascertained, if not included in the judgment, the clerk must insert the same in a blank left in the judgment for that purpose, and must make a similar entry in the copies and docket of the judgment.<sup>363</sup>

§ 4836. **Costs are part of judgment.** Costs are included in and constitute a part of the judgment; and hence, though ascertained and adjudged by the court after an entry of the judgment by the clerk may have been made, yet the law considers such action of the court as having preceded the final judgment.<sup>364</sup>

§ 4837. **Ejectment.** If the plaintiff in ejectment recovers judgment he is entitled to the costs, although his recovery is for only a portion of the demanded premises, and the defendant recovers judgment for the residue.<sup>365</sup>

§ 4838. **In equity.** Costs in equity are always in the discretion of the court, and whether granted or withheld, are but as incidents to, and no part of, the relief sought.<sup>366</sup>

§ 4839. **Injunction.** In a suit for damages to a mining claim and for an injunction, plaintiffs had judgment for one hundred dollars, and costs taxed at ..... dollars, a perpetual injunction being granted also. After the judgment was entered, plaintiffs moved that costs for the trial be allowed. The motion was denied, except as to the costs accrued by reason of

<sup>362</sup> O'Conner v. Blake, 29 Cal. 312; Edgar v. Gray, 5 id. 267; see Meads v. Lasar, 43 id. 530.

<sup>363</sup> Cal. Code Civ. Pro., § 1035; and see Orr v. Haskell, 2 Mont. 350. For the former practice, see Chapin v. Broder, 16 Cal. 403.

<sup>364</sup> Lasky v. Davis, 33 Cal. 677.

<sup>365</sup> Havens v. Dale, 30 Cal. 547.

<sup>366</sup> Gray v. Dougherty, 25 Cal. 282; see, also, Abram v. Stuart, 96 id. 235; Cole v. Logan, 24 Oreg. 304; Lovejoy v. Chapman, 23 id. 571. Without a statement or bill of exceptions this discretion can not be reviewed upon appeal. Faulkner v. Hendy, 103 Cal. 13. In some equity cases counsel fees may be awarded, in the discretion of the court. Salmina v. Juri, 96 Cal. 418.

the injunction granted; it was held that this is a case where the allowance of costs is in the discretion of the court below.<sup>367</sup>

§ 4840. **Money or damages.** Costs of a suit form no part of the matter in dispute, and an appeal does not lie to the Supreme Court where the amount involved is less than two hundred dollars, although the costs added thereto may increase it beyond that sum.<sup>368</sup>

§ 4841. **On appeal.** The judgment of the Supreme Court on appeal, and costs consequent thereon, is final, and the Superior Court has no authority to prevent immediate execution of the judgment of this court so remitted.<sup>369</sup> The clerk of the Supreme Court, in entering up the judgment, adds the words "with costs," and annexes to the *remittitur* a copy of the bill of costs filed; these words are a sufficient awarding of costs for the clerk below to issue an execution.<sup>370</sup> The costs on appeal, or properly the costs in this court, and the costs of making up the appeal in the court below, including the costs of making out the transcript and the costs of the former trial, abide the event of the suit.<sup>371</sup>

§ 4842. **On judgment affirmed in part and reversed in part.** Where a judgment was affirmed in part and reversed in part,

<sup>367</sup> *Esmond v. Chew*, 17 Cal. 336. Costs in injunction suits. See *Himes v. Johnson*, 61 Cal. 259; *Brown v. Delevan*, 63 id. 303; *Davidson v. Devine*, 70 id. 519; *Abram v. Stuart*, 96 id. 235.

<sup>368</sup> *Dumphy v. Guindon*, 13 Cal. 30; see *Zabriskie v. Torrey*, 20 id. 174. Under the California statute (Code Civ. Pro., § 1025), providing that "no costs can be allowed in an action for the recovery of money or damages when the plaintiff recovers less than three hundred dollars," neither party can recover costs in such case, and the defendant is not entitled to a judgment against the plaintiff for his costs. *Anthony v. Grand*, 101 Cal. 235.

<sup>369</sup> *City of Marysville v. Buchanan*, 3 Cal. 212.

<sup>370</sup> Id. See, as to costs on reversal, *Estate of Robinson*, 106 Cal. 493.

<sup>371</sup> *Gray v. Gray and Eaton v. Palmer*, 11 Cal. 341; *Ex parte Burrill*, 24 id. 350. Case where each party was made to pay his own costs on appeal. *Bradbury v. Barnes*, 19 Cal. 120. Case where costs of motion in Supreme Court were not allowed. *Swain v. Naglee*, 19 Cal. 127. Case where appellant paid costs in Supreme Court. *Jungerman v. Bovee*, 19 Cal. 355. The Supreme Court is not bound, in taxing costs on an appeal, to allow the amount actually paid for printing briefs, when such amount appears unreasonable. *State v. Friedrich*, 3 Wash. St. 418.

the respondent may be allowed his costs in the court below, and be required to pay the costs of the appeal.<sup>372</sup> Judgment may be affirmed as to a *mandamus*, but reversed as to costs.<sup>373</sup> Thus, where a judgment of the court was incorrect in part, the appellate court ordered the court below to modify its judgment accordingly, and the appellants recovered the costs of their appeal.<sup>374</sup>

§ 4843. **On new trial awarded.** When a judgment for plaintiff is refused by the appellate court, and a new trial is awarded, if plaintiff recovers judgment on the second trial, he is entitled to his costs in the court below incurred on the first trial.<sup>375</sup>

§ 4844. **On judgment reversed.** Where a judgment is reversed by the Supreme Court, and the case remanded for further proceedings, and costs are awarded in general terms, the costs awarded include only the costs made on the appeal to the Supreme Court. The costs of the former trial abide the event of the suit.<sup>376</sup> Where the judgment below is reversed on appeal and a new trial had, the costs of the first trial are part of the final bill of costs.<sup>377</sup> Appellant made to pay costs, although the judgment is reversed.<sup>378</sup> If no motion be made in the court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the Supreme Court at appellant's cost.<sup>379</sup> If any one or more of the parties desire a modification

<sup>372</sup> *Cole v. Swanston*, 1 Cal. 51.

<sup>373</sup> *McDougal v. Roman*, 2 Cal. 80.

<sup>374</sup> *Welch v. Sullivan*, 8 Cal. 512; see *Cassin v. Marshall*, 18 id. 603.

<sup>375</sup> *Stoddard v. Treadwell*, 29 Cal. 281.

<sup>376</sup> *Ex parte Burrill*, 24 Cal. 350.

<sup>377</sup> *Visher v. Webster*, 13 Cal. 58.

<sup>378</sup> *Reniff v. The Cynthia*, 18 Cal. 669. The expense of printing the record and the appellant's brief, and the stenographer's fee, are not, in the absence of a statute, properly items of costs awarded appellant on the reversal of the judgment. *Price v. Garland*, 4 N. Mex. 365. Taxation as costs of stenographer's fees. See *McDonald v. Burke*, 2 Idaho, 995; *Barkly v. Copeland*, 86 Cal. 493; *Marks v. Culmer*, 7 Utah, 163; *First Nat. Bank v. North*, 6 Dak. 136. Expenses incurred by a party to a suit in the employment of experts are not taxable as costs. *McDonald v. Burke*, 2 Idaho, 995; see *Faulkner v. Hendy*, 79 Cal. 265. Attorney's fee not taxable as costs. *Marks v. Culmer*, 7 Utah, 163. And the clerk is not authorized to tax fees for approving appeal and *supersedeas* bonds. *Soules v. McLear*, 7 Wash. St. 451.

<sup>379</sup> *Tryon v. Sutton*, 13 Cal. 491.

of the judgment as to costs, the proper application should have been made within the ten days allowed for filing a petition for a rehearing.<sup>380</sup> Defendants below and appellants here, on the main question, to-wit, the injunction, required to pay costs in this court on both appeals.<sup>381</sup>

§ 4845. *On remittitur.* The party responsible for erroneous proceedings after the *remittitur* has been sent down from the Supreme Court must pay the costs of those proceedings, and the costs consequent on a second appeal caused by them.<sup>382</sup> If the printed transcript in the Supreme Court is unnecessarily long, the party responsible for this will be adjudged to pay the costs of printing thus unnecessarily incurred.<sup>383</sup> The clerk of the court below can issue an execution, if required by the prevailing party, for the costs included in the memorandum and the costs of the clerk of the Supreme Court, as certified by him in the *remittitur*.<sup>384</sup>

§ 4846. *Right of use of water.* In an action to try the right of the use of water, and for damages for diverting it, where the amount for which judgment is given is less than two hundred dollars, it will carry costs.<sup>385</sup>

§ 4846a. *Costs — in particular cases.* Section 997, California Code of Civil Procedure, providing that in case of an offer of judgment by the defendant, "if the plaintiff fail to obtain a more favorable judgment he can not recover costs, but must pay the defendant's costs from the time of the offer," is to be construed as applying only to costs accruing after the time of the offer.<sup>386</sup> In actions to foreclose liens of materialmen and subcontractors in the city and county of San Francisco, the plaintiff, as the prevailing party, is entitled to recover as costs the percentage on the amount recovered, fixed by the act of February 9, 1866.<sup>387</sup> The provisions of section 6 of this act

<sup>380</sup> Gray v. Gray, 11 Cal. 341.

<sup>381</sup> Jungerman v. Bovee, 19 Cal. 355.

<sup>382</sup> Argenti v. City of San Francisco, 30 Cal. 458.

<sup>383</sup> People v. Holden, 28 Cal. 124.

<sup>384</sup> *Ex parte* Burrill, 24 Cal. 350.

<sup>385</sup> Marinus v. Bicknell, 10 Cal. 217; Vautan v. Reese, 20 id. 90.

<sup>386</sup> Douthitt v. Finch, 84 Cal. 214; and see Scammon v. Denio, 72 id. 393.

<sup>387</sup> Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114; and see Packard v. Wilson, 72 id. 124; Fanning v. Leviston, 93 id. 186.

does not include a judgment in the alternative in an action of replevin for the return of the property, or its value with interest.<sup>388</sup> But actions to enforce a street assessment are included therein.<sup>389</sup> Where specific performance is refused because of the fraudulent misrepresentations of the plaintiff, and the defendant is free from blame, costs should not be awarded to the plaintiff, but should be awarded to the defendant.<sup>390</sup>

**§ 4846b. The same — security for.** The cost bond required of nonresidents before commencing suit, if tendered after action brought, even though before the motion to dismiss is interposed, comes too late.<sup>391</sup> Whether or not a resident plaintiff shall be required to give security for costs under Colorado act of 1885 (Sess. Laws, 156), is a matter resting in the sound discretion of the court.<sup>392</sup> In an action against several defendants by a non-resident plaintiff, he can not under Washington Code of Procedure, § 844, be compelled to furnish a separate bond for costs to each defendant appearing and claiming such bond.<sup>393</sup>

**§ 4846c. The same — vacating judgment for.** A party may, under the Oregon statute (Hill's Code, § 102), be relieved from a judgment for costs and disbursements entered against him if it shall appear that it was entered through mistake, inadvertence, surprise, or excusable neglect.<sup>394</sup>

<sup>388</sup> Wheatland Mill Co. v. Pirrie, 89 Cal. 459.

<sup>389</sup> Fanning v. Leviston, 93 Cal. 186.

<sup>390</sup> Kelly v. Cent. Pac. R. R. Co., 74 Cal. 565. Costs in action by executor or administrator. See Stevens v. Railroad Co., 103 Cal. 252; Reay v. Butler, 99 id. 477. Liability for costs of guardian *ad litem*. Granholm v. Sweigle, 3 N. Dak. 476.

<sup>391</sup> Edgar, etc., Min. Co. v. Taylor, 10 Col. 110.

<sup>392</sup> Ward v. Wilms, 16 Col. 86.

<sup>393</sup> Robinson v. Holler, 8 Wash. St. 309.

<sup>394</sup> Weiss v. Meyer, 24 Oreg. 108; see § 4820. *ante*.



# PART ELEVENTH

## NEW TRIAL,

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### CHAPTER I.

#### NEW TRIAL IN GENERAL.

§ 4847. **In general.** A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury, court, or referees.<sup>1</sup> At common law, new trial is defined to be a "re-examination of an issue of fact before a court and jury, which had been tried at least once before the same court and jury."<sup>2</sup> It is said "the origin of the practice of granting new trials is concealed in the night of time." In modern practice, as well as in former times, new trials are granted for the purpose of more fully securing to the parties litigant complete justice. New trials are granted on the theory: 1. That at the former trial there was some error of law committed by the court; or 2. That at the former trial some evidence material to the issue was not presented, the existence of which testimony being then unknown to the party making the application for a new trial, or at the time beyond his control, and which testimony is not cumulative in its character; or 3. Surprise, whereby the rights of the parties were materially affected at the former trial. In other words, new trials are granted for errors of the judge in matters of law, and errors of the jury in matters of fact.<sup>3</sup> And in any event, a new trial must be granted for some matter

<sup>1</sup> Cal. Code Civ. Pro., § 656; Gregory v. Gregory, 102 Cal. 52; Laws of Nevada, § 194; Oregon, § 231; Idaho, § 208; N. Dak. Code Civ. Pro., § 285; Arizona, § 194; Washington Code Pro., § 399; Montana Code Civ. Pro., § 1170; Wyo. Comp. Laws, § 306. Where all the facts are agreed upon there is no issue of fact to be re-examined, and no ground for a new trial. Gregory v. Gregory, 102 Cal. 50.

<sup>2</sup> Hilliard New Trials, 1.

<sup>3</sup> Rochell v. Phillips, Hempst. 23.

outside of the record.<sup>4</sup> The law presumes the verdict to be correct, and hence the party excepting must show clearly that the former decision was wrong. Error must distinctly appear, and not be left shadowed in doubt. When, for instance, there are more issues than one submitted, one good, and the rest bad, and a general finding, the presumption is that the jury disregarded the immaterial issue.<sup>5</sup> When a party desires to show that a judge ruled erroneously, it must be made to appear: 1. What rulings were made; 2. That they were excepted to; 3. Wherein they were erroneous; 4. The materiality of the ruling; for unless the error had some influence in determining the verdict, no wrong is done, and a new trial should not be granted;<sup>6</sup> 5. An exception against the weight of evidence is not good unless it clearly appear that all the evidence is in the record.<sup>7</sup> All these are general propositions, which are in most of the states authoritatively settled by statute and the decisions of the courts. When a judgment and verdict are in accordance with the evidence, and there is no substantial conflict in it upon any material issue, and no error has intervened, the court has no right to grant a new trial, and if it do so, its order will be set aside as unauthorized.<sup>8</sup> When a suit has been regularly prosecuted to judgment, and substantial justice has been done, the parties are not entitled to invoke the interposition of the court for the purpose of having the cause retried and again determined at the expense of the public, and to the delay of other suitors, although both of the litigants join in the application.<sup>9</sup> It is useless to put parties to the additional trouble and expense of a new trial when it is clearly seen that after a protracted litigation the result must be the same,<sup>10</sup> nor will a new trial be granted, as a general rule, to enable a party to recover nominal damages.<sup>11</sup> A new trial can not be granted until there has been a determination of the issues of fact.<sup>12</sup> Where a new trial is ordered, and

<sup>4</sup> *Bowie v. The State*, 19 Ga. 1.

<sup>5</sup> *Hilliard New Trials*, 17.

<sup>6</sup> *Id.* 18.

<sup>7</sup> *Id.* 21.

<sup>8</sup> *Lawrence v. Burnham*, 4 Nev. 361; 97 Am. Dec. 540.

<sup>9</sup> *Nichols v. Sixth Avenue R. R. Co.*, 10 Bosw. 260; *Phelan v. Ruiz*, 15 Cal. 90.

<sup>10</sup> *Tohler v. Folsom*, 1 Cal. 207; *Smith v. Compton*, 6 *id.* 26; *Sunol v. Hepburn*, 1 *id.* 285.

<sup>11</sup> *Briggs v. Morse*, 42 Conn. 258; *McConihe v. N. Y. & E. R. R. Co.*, 20 N. Y. 495; 75 Am. Dec. 420; *Nolan v. Harris*, 52 How. Pr. 409.

<sup>12</sup> *Putnam v. Crombie*, 34 Barb. 232.

the order is based upon a decision determining the principles of law which govern the action, the new trial must be conducted in accordance with the principles thus determined.<sup>13</sup> A new trial can not be prosecuted pending an appeal from an order granting the same.<sup>14</sup> Where judgment of the appellate court directs the court below what judgment to render, a new trial is not authorized.<sup>15</sup>

§ 4848. **Power of court to grant.** The courts of the United States are empowered to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.<sup>16</sup> So in actions for the recovery of a penalty, although the verdict was in favor of the defendant. On a reversal of a judgment, in an action brought by a writ of error from a District Court, the Circuit Court of another state may, if justice require it, award a *venire facias de novo*, triable at the bar of such Circuit Court, according to the provisions of section 24 of the act of September 24, 1789.<sup>17</sup> If an order granting a new trial be reversed on the ground that it was prematurely made, the effect is to leave the motion for a new trial still pending in the court below to be regularly disposed of.<sup>18</sup> If the judge of a District or Circuit Court die, his successor has power to grant a new trial.<sup>19</sup> The power of a court of common law to grant new trials, and the grounds upon which it may be granted, explained.<sup>20</sup> The Legislature has no power to grant a new trial or reopen a judgment in an action litigated between individuals.<sup>21</sup> The court has

<sup>13</sup> *Leese v. Clark*, 20 Cal. 387; *Soule v. Ritter*, id. 522; *Table Mountain Tunnel Co. v. Stranahan*, 21 id. 548; *Heirs of Nieto v. Carpenter*, id. 455; *Mitchell v. Davis*, 23 id. 381; *Moore v. Murdock*, 26 id. 524; *Lucas v. San Francisco*, 28 id. 591; *Estate of Pacheco*, 29 id. 224; *Mulford v. Estudillo*, 32 id. 131; *Kille v. Tubbs*, id. 332; *Argenti v. Sawyer*, id. 414.

<sup>14</sup> *Ford v. Thompson*, 19 Cal. 118.

<sup>15</sup> *Argenti v. City of San Francisco*, 30 Cal. 458.

<sup>16</sup> U. S. R. S. (ed. 1878), § 726.

<sup>17</sup> *United States v. Sawyer*, 1 Gall. 86; see, also, *United States v. Wonson*, id. 5; *United States v. Harding*, 1 Wall. jun. O. C. 127; *United States v. Macomb*, 5 McLean, 286; *United States v. Taylor*, 4 Cranch C. C. 338.

<sup>18</sup> *Thomas v. Sullivan*, 11 Nev. 280.

<sup>19</sup> *Life and Fire Ins. Co. of New York v. Wilson*, 8 Pet. 291.

<sup>20</sup> *United States v. Thirteen Hundred and Sixty-three Bags of Merchandise*, 2 Sprague, 85.

<sup>21</sup> *People v. Frisbie*, 26 Cal. 135.

power to set aside report of referee, and grant a new trial, on the ground that evidence before referee did not justify his decision.<sup>22</sup> Or for any reason that would be sufficient to set aside the award of an arbitrator,<sup>23</sup> or the verdict of a jury.<sup>24</sup> The court may of its own motion, without the application of either party, vacate the verdict of a jury and grant a new trial, where the court is satisfied that the verdict was rendered under a misapprehension of the instructions, or the influence of passion or prejudice.<sup>25</sup> And where the defendant in a criminal case is convicted and appeals, and the judgment is reversed, the appellate court may order a new trial, although the defendant did not move for a new trial, and denies the power of the court to grant one.<sup>26</sup> The County Court in California, prior to the present Constitution, had power to grant a new trial. The appellate power of the Supreme Court over the County Court could not be properly or efficiently exercised unless the power to grant a new trial existed in the County Court.<sup>27</sup> But the County Court had no power to grant a new trial, in a special case, to contest an election under the statute.<sup>28</sup> Such proceedings are special cases.<sup>29</sup> A *mandamus* would not lie to compel a county judge to try a cause, on the ground that he has improperly dismissed the appeal taken from a Justice's Court.<sup>30</sup> On appeal from the Justice's Court to the Superior Court, on questions of law alone, if a new trial be ordered, it should take place in the Superior Court.<sup>31</sup>

§ 4849. **Powers of equity.** Courts of equity will not grant relief against judgments recovered at law, unless the party asking for relief was unable to avail himself of his defense in the action at law, or was prevented from doing so by fraud, accident, or mistake, without negligence on his part.<sup>32</sup> A bill of review

<sup>22</sup> *Cappe v. Brizzolara*, 19 Cal. 607.

<sup>23</sup> *Headley v. Reed*, 2 Cal. 322.

<sup>24</sup> *McHenry v. Moore*, 5 Cal. 90.

<sup>25</sup> Cal. Code Civ. Pro., § 662; see *Duff v. Fisher*, 15 Cal. 375.

<sup>26</sup> *State v. Rover*, 10 Nev. 388; 21 Am. Rep. 745.

<sup>27</sup> *Dickenson v. Van Horn*, 9 Cal. 207.

<sup>28</sup> *Casgrave v. Howland*, 24 Cal. 457; see *Dorsey v. Barry*, *id.* 455.

<sup>29</sup> *Keller v. Chapman*, 34 Cal. 640.

<sup>30</sup> *People v. Weston*, 28 Cal. 639.

<sup>31</sup> *People v. Freelon*, 8 Cal. 517. The Superior Court has jurisdiction to grant a new trial in the case of a nonsuit on the trial of an appeal to it from a Justice's Court. *Massman v. Superior Court*, 71 Cal. 582.

<sup>32</sup> *Quinn v. Wetherbee*, 41 Cal. 247.

for new trial must be filed within the time allowed for the prosecution of an appeal or writ of error.<sup>33</sup> The application must be made promptly; it is too late two years after the facts are discovered.<sup>34</sup> It is a well-established rule that equity never will grant a new trial of a matter which has been determined in a court of law; it being a matter over which the court of law has full jurisdiction.<sup>35</sup> But where injustice is done by a final judgment, without default of defendant therein in pleadings, or producing evidence, equity will interfere. Or the chancellor may direct a new trial at law, on good grounds, and on sufficient reason being shown for failure to apply to the common-law judge.<sup>36</sup> So a new trial at law was decreed where the officer's return had been altered. Where it would be proper for a court of law to grant a new trial, if the application had been made while that court had the power, it is equally proper for a court of equity to do so, if the application be made when the court of law has no means of granting such trial; but it will only interfere in case of newly-discovered evidence, surprise, or fraud, or where a party is deprived of the means of defense by circumstances beyond his control.<sup>37</sup> Chancery will not order a new trial at law in favor of a party who has neglected to apply at law, except under very special circumstances.<sup>38</sup> A party can not maintain an action in a court of equity, to obtain a new trial in a court of law, without showing that he had no opportunity to move for a new trial in the law court, by reason of mistake, accident, or surprise, unaccompanied by any fault or negligence on his part.<sup>39</sup> Or where no circumstances of fraud are shown.<sup>40</sup> Or unless the judgment was obtained through

<sup>33</sup> *Allen v. Currey*, 41 Cal. 318.

<sup>34</sup> *Neal v. Byers*, 45 Cal. 234.

<sup>35</sup> *Green v. Robinson*, 5 How. (Miss.) 80.

<sup>36</sup> *Hunt v. Boyier*, 1 J. J. Marsh. 484.

<sup>37</sup> *Horn v. Queen*, 4 Neb. 108.

<sup>38</sup> *Hill v. McNeill*, 8 Port. 432; *Gales v. Shipp*, 2 Bibb, 241; *Patterson v. Matthews*, 3 id. 80. It is a general principle of law that a court of chancery may decree a new trial after the courts of law are barred by lapse of time from so doing. *Tice v. School District*, 17 Fed. Rep. 283.

<sup>39</sup> *Mastick v. Thorp*, 29 Cal. 144; *Faulkner v. Harwood*, 6 Rand. 125; but see *Cummins v. Kennedy*, 4 J. J. Marsh. 642; *Harrison v. Harrison*, 1 Litt. 137.

<sup>40</sup> *Borland v. Thornton*, 12 Cal. 441; *Boston v. Haynes*, 33 id. 31; *Land v. Elliott*, 1 Smed. & M. 608; *Herring v. Winans*, 1 Smed. & M. Ch. 466.

fraud, accident, or mistake, unconnected with negligence or inattention on the part of the judgment debtor.<sup>41</sup> A purchaser of land during pendency of suit against grantor for its recovery, with notice of suit pending, who neglects to defend it till judgment is rendered, and then neglects to move for a new trial, can not obtain a new trial in a court of equity.<sup>42</sup> An application made in a court of equity for a new trial, on the ground that the defendant was defaulted, and thereby prevented from maintaining a claim in set-off, will be refused, if it does not appear that he is in danger of losing his claim.<sup>43</sup> A court of equity should not grant a new trial at law upon the ground that a party was deprived, without fault on his part, of his remedy, by writ of error to correct erroneous rulings on the first trial, when no error in the judgment at law appears on the record.<sup>44</sup> Where a party moves for a new trial and fails, he can not, on the same facts, go into equity to enjoin the judgment rendered.<sup>45</sup> In a suit in equity, if the issues are submitted to a jury and a general verdict returned, which the court afterwards sets aside on motion for a new trial, it is unnecessary for the court to grant a new trial; the court may, upon the testimony already given, and such further testimony as may be taken, in its discretion determine the issues of fact and give final judgment.<sup>46</sup>

**§ 4850. Granting motion discretionary.** Motions for new trial are addressed to the sound discretion of the court, and are granted or denied, not as matter of strict right, but as the substantial justice of the case may appear to require.<sup>47</sup> And where a new trial has been granted it is presumed the discretion was properly exercised; and the burden of showing that it was

<sup>41</sup> *Day v. Welles*, 31 Conn. 344.

<sup>42</sup> *Mastick v. Thorp*, 29 Cal. 444.

<sup>43</sup> *Clute v. Ewing*, 21 Tex. 679.

<sup>44</sup> *Parker v. Horne*, 38 Miss. 215.

<sup>45</sup> *Collins v. Butler*, 14 Cal. 223; *Borland v. Thornton*, 12 id. 441; *Mastick v. Thorp*, 29 id. 444.

<sup>46</sup> *Wingate v. Ferris*, 50 Cal. 105.

<sup>47</sup> *Drake v. Palmer*, 2 Cal. 177; affirmed in *Hastings v. Steamer Uncle Sam*, 10 id. 341; *Palmer v. Stewart*, id. 353; *Speck v. Hoyt*, 3 id. 413; *Peters v. Foss*, 16 id. 357; *Smith v. Richmond*, 15 id. 501; *Nooney v. Mahoney*, 30 id. 226; *O'Brien v. Brady*, 23 id. 243; *Quinn v. Kenyon*, 22 id. 82; *Lestrade v. Barth*, 17 id. 286; *Hall v. Bark Emily Banning*, 33 id. 525; 91 Am. Dec. 655; *Clayton v. Yarrington*, 33 Barb. 145; *State v. Anderson*, 19 Mo. 241; *McLanahan v. Universal Ins. Co.*, 1 Pet. 170; *Calbreath v. Gracy*, 1 Wash. C. C. 198; *Denniston*

not devolves upon the party appealing from the order.<sup>48</sup> A court is not bound to grant a new trial, although both parties desire it.<sup>49</sup> Where a new trial was granted on the ground of irregularity in the presence of the court, the appellate court will not review the question as to whether the court below was mistaken on the question of fact involved.<sup>50</sup> A new trial should not be granted unless the evidence strongly preponderates against the verdict.<sup>51</sup> Or where the question of law was adverse to the verdict.<sup>52</sup> Or where errors intervened in the trial of a cause.<sup>53</sup> Or where the judgment is erroneous, by reason of a wrong construction given to the description of land in a deed in evidence.<sup>54</sup> So where on the trial it was not fully disclosed by the evidence where the initial point was located in the boundary of land, a new trial was ordered for a more full disclosure.<sup>55</sup> Or where the jury, without particular instructions, returned a verdict payable in gold coin, though there was no evidence that the defendant promised in writing to pay in gold coin, a new trial was

*v. McKeen*, 2 McLean, 253; *United States v. Martin*, id. 256; *Benedict v. Davis*, id. 347; *Lloyd v. Scott*, 4 Cranch, C. C. 206; *Shepherd v. Brenton*, 15 Iowa, 84; *Whitney v. Blunt*, id. 283; *McNair v. McComber*, id. 368; *McKay v. Thorington*, id. 25; *Head v. Langworthy*, id. 235; *House v. Wright*, 22 Ind. 383; *Magee v. Railroad Co.*, 78 Cal. 430; *Bennett v. Hobro*, 72 id. 178; *Wiedekind v. Water Co.*, 83 id. 198; *Hawes v. Clark*, 84 id. 272; *People v. Merkle*, 89 id. 82; *Crooks v. Miller*, id. 35; *Groppenglesser v. Lake*, 103 id. 37; *Edwards v. Water Co.*, 21 Nev. 469; *Alt v. Railroad Co.*, 5 S. Dak. 20; *Corbitt v. Harrison*, 14 Wash. St. 197; see, also, *Forrest v. Forrest*, 25 N. Y. 501; *Denver Tramway Co. v. Owens*, 20 Col. 107; *Clifford v. Railroad Co.*, 12 id. 125; *Cook v. Doud*, 14 id. 483; *City of Denver v. Jacobson*, 17 id. 497. Under the Wyoming statute (Comp. Laws, § 306), a motion for a new trial which presents questions of law is not addressed to the discretion of the court. *United States v. Trabing*, 3 Wyo. 144.

<sup>48</sup> *Hobler v. Cole*, 49 Cal. 250. That it is not a matter of mere discretion in all cases, see *Anderson v. Rome, W. & O. R. R. Co.*, 54 N. Y. 334; *Sacramento, etc., M. Co. v. Showers*, 6 Nev. 291.

<sup>49</sup> *Phelan v. Ruiz*, 15 Cal. 90; *Aiken v. Bruen*, 21 Ind. 137; *Nichols v. Sixth Ave. R. R. Co.*, 10 Bosw. 260.

<sup>50</sup> *Thompson v. Thornton*, 47 Cal. 76.

<sup>51</sup> *Treadway v. Wilder*, 9 Nev. 67; *Williams v. State*, 9 Mo. 268; *Robbins v. Alton, etc., Ins. Co.*, 12 id. 380; *Williams v. Buker*, 49 Me. 427.

<sup>52</sup> *Speck v. Hoyt*, 3 Cal. 413.

<sup>53</sup> *Hastings v. Steamer Uncle Sam*, 10 Cal. 341.

<sup>54</sup> *Hicks v. Coleman*, 25 Cal. 145; *Piercy v. Crandall*, 34 id. 334.

<sup>55</sup> *Piercy v. Crandall*, 34 Cal. 334.



granted.<sup>56</sup> But a new trial will not be granted to allow a party to contradict admissions on a former trial.<sup>57</sup> In Indiana, it appears in a civil case, only two new trials can be granted to the same party in the cause, upon any grounds whatever.<sup>58</sup> The court will not entertain a second application for a new trial by the same party in the same suit, unless it appears or is shown that the party did not know or could not have known the grounds upon which the second application rests at the time the former application was submitted.<sup>59</sup> In New York, in actions to recover possession of lands, the grant of a third trial is in the discretion of the court.<sup>60</sup>

§ 4851. **Court may impose terms.** Where a new trial is asked as a matter of favor or rests in the discretion of the court, a condition may be imposed upon granting it; but where a party asks it as a matter of right, because some legal error was committed, the appellate court has no discretion to grant or withhold it; but, finding error, is bound to reverse the judgment and grant a new trial, and can not impose a condition thereon.<sup>61</sup> If the findings are not sustained by the evidence, in a question of damages, the court may require the plaintiff to remit the damages or submit to a new trial.<sup>62</sup> After the court grants a new trial on terms, as a rule the court above will not interfere in these matters.<sup>63</sup> The terms upon granting new trials are peculiarly within the discretion of the court, with the exercise of which the appellate court will not interfere, except on a clear

<sup>56</sup> Howard v. Roeben, 33 Cal. 399.

<sup>57</sup> Vandall v. S. S. F. Dock Co., 40 Cal. 92.

<sup>58</sup> Roberts v. Robeson, 22 Ind. 456.

<sup>59</sup> Hayes v. Kenyon, 7 R. I. 531.

<sup>60</sup> Wright v. Milbank, 9 Bosw. 672. In Colorado, any party against whom judgment is rendered in an action to recover possession of real property, may have one new trial "as of right, without showing cause," upon complying with certain terms. See Snider v. Rinehart, 18 Col. 18.

<sup>61</sup> Anderson v. Rome, W. & O. R. R. Co., 54 N. Y. 334; see Eaton v. Jones, 107 Cal. 487.

<sup>62</sup> Carpentier v. Gardner, 29 Cal. 160; Rigney v. Water Co., 9 Wash. St. 245; Davis v. South. Pac. Co., 98 Cal. 13; see Paterson v. Ely, 19 id. 28; Benedict v. Cozzens, 4 id. 382. If a verdict for the plaintiff is for an excessive amount, the defendant is entitled to have it reduced or a new trial granted without the imposition of any terms upon him. Gardner v. Tatum, 81 Cal. 370; see § 4909, *post*.

<sup>63</sup> Hilliard New Trials, 53.



showing of abuse or grossly unreasonable terms.<sup>64</sup> It seems to be the rule in England, if a new trial is allowed on a question of merits, costs will be allowed, but otherwise if allowed for irregularity.<sup>65</sup> So if payment of costs be made a condition precedent, and it is not done in the time prescribed, the judgment remains in force.<sup>66</sup> Where a party complies with the terms imposed and avails himself of the order, he can not afterwards question its correctness.<sup>67</sup>

<sup>64</sup> *Rice v. Gashirle*, 13 Cal. 54; *Battelle v. Connor*, 6 id. 140. Reduction of verdict. *Harrison v. Peabody*, 34 Cal. 179; *Chapin v. Bourne*, 8 id. 296; *Davis v. South. Pac. Co.*, 98 id. 13. On payment of costs. *Tyson v. Wells*, 1 Cal. 378; *Overing v. Russell*, 28 How. Pr. 151; see, also, *East River Bank v. Hoyt*, 22 id. 478; *North v. Sergeant*, 33 Barb. 350; *Zimmerman v. Marchland*, 23 Ind. 474.

<sup>65</sup> *Hilliard New Trials*, 53. The court, in its discretion, may make payment of costs the condition upon which to grant a new trial. *Garoutte v. Haley*, 104 Cal. 497; and see *Brown v. Cline*, 109 id. 156; *Garoutte v. Williamson*, 108 id. 135.

<sup>66</sup> *Id.*; *State v. Jacobs*, 6 Tex. 199.

<sup>67</sup> *Battelle v. Connor*, 6 Cal. 140.

## CHAPTER II.

### PROCEEDINGS ON MOTION FOR NEW TRIAL.

§ 4852. **Steps requisite.** There are three distinct steps recognized in a proceeding to obtain a new trial, for the taking of which, except the last, a particular period of time is allowed: 1. A notice of intention to move for a new trial; 2. Filing and serving statements or affidavits; and 3. The motion for a new trial.<sup>1</sup> An order extending the time for taking either of these steps should express with precision the object to be attained.<sup>2</sup>

§ 4853. **Notice of intention to move for new trial.**

*Form No. 1149.*

[TITLE.]

To . . . . ., attorney for plaintiff:

Take notice, that defendant, C. D., intends to move the court to vacate and set aside the verdict [or decision of the court] rendered in the above cause, and to grant a new trial of said cause, upon the following grounds, to-wit:

I. Irregularity in the proceedings of the court [jury, or adverse party, or any order of the court, or abuse of discretion], by which the defendant was prevented from having a fair trial.

II. Misconduct of the jury [or a resort by the jury to the determination of chance on the questions submitted to them].

III. Accident or surprise, which ordinary prudence could not have guarded against.

IV. Newly-discovered evidence material to the defendant, which he could not with reasonable diligence have discovered and produced at the trial.

V. Excessive damages appearing to have been given under the influence of passion or prejudice.

VI. Insufficiency of the evidence to justify the verdict [or other decision; or that the verdict is against law].

<sup>1</sup> Jenkins v. Frink, 27 Cal. 337.

<sup>2</sup> Id. The right to move for a new trial is statutory, and must be pursued in the manner pointed out by the statute. Burton v. Todd, 68 Cal. 485; Kelly v. Larkin, 47 id. 58.

VII. Errors in law occurring at the trial, and excepted to by the defendant, to-wit.

Said motion will be made upon affidavits hereafter to be filed and served upon you [or upon bill of exceptions, or a statement of the case hereafter to be prepared, or upon the minutes of the court in said cause].<sup>3</sup>

**§ 4854. Application, how made.** When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the foregoing notice, it must be made upon affidavits; for any other cause it may be made at the option of the moving party, either upon the minutes of the court or a bill of exceptions or a statement of the case.<sup>4</sup> And the notice of intention must designate the grounds upon which the motion will be made, and whether it will be made upon affidavits or the minutes of the court, or a bill of exceptions, or a statement of the case.<sup>5</sup>

**§ 4855. Notice, time within which it must be given.** The party intending to move for a new trial must, within ten days after the verdict of the jury if the action was tried by a jury, or after notice of the decision of the court or referee if the action was tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention.<sup>6</sup> Where notice

<sup>3</sup> See Cal. Code Civ. Pro., § 657. If the motion be made on the minutes of the court, and the ground is insufficiency of evidence or errors of law, the notice must specify the particulars wherein the evidence is insufficient, or the particular errors of law, or the motion must be denied. Cal. Code Civ. Pro., § 659, subd. 4. See specifications appended to statement on motion for new trial, *post*.

<sup>4</sup> Cal. Code Civ. Pro., § 658.

<sup>5</sup> Id., § 659; Hughes v. Alsip, 112 Cal. 587.

<sup>6</sup> Id., § 659. And see, as to time for notice of intention, Gumpel v. Castagnetto, 97 Cal. 15; Waddingham v. Tubbs, 95 id. 249; Robinson v. Benson, 19 Nev. 331. The notice is premature and ineffectual if given before the findings are signed. Dominguez v. Mascotti, 74 Cal. 269; James v. Superior Court, 78 id. 107; Careaga v. Fernald, 66 id. 351. But the notice may be given before the receipt of the notice of the decision, and when so given is in time. Symons v. Bunnell, 80 Cal. 330; see Carpenter v. Hewel, 67 id. 589. Extension of time in which to give notice of intention. See Burton v. Todd, 68 Cal. 485; Brichman v. Ross, 67 id. 601; the time may be extended by stipulation of counsel. Simpson v. Budd, 91 Cal. 488. Waiver of objection that notice was not in time. Schieffery v. Tapia, 68 Cal. 184. Where the notice is not filed with

of the decision is necessary, the time within which notice of intention to move for new trial must be served does not begin to run until after written notice of the decision has been given.<sup>7</sup> And where it does not appear that any written notice of the decision had been given, the statement can not be objected to on the ground that it was not filed in time.<sup>8</sup> If notice is not served and filed within the time the motion is properly denied,<sup>9</sup> an admission of service on a certain day is not a waiver of the objection that service on that day is too late.<sup>10</sup>

§ 4856. **Notice, how given.** Notice of intention must be given in writing.<sup>11</sup> And must be served upon the attorney of record of the party,<sup>12</sup> unless such service is waived.<sup>13</sup> And must be given by the attorney of record of the party giving it.<sup>14</sup>

§ 4857. **Notice generally.** The notice must designate the grounds upon which the motion will be made, or it is insufficient, and the defect is not cured by designating the grounds in

the clerk within the time allowed by law the motion for a new trial is properly denied, although the notice has been served upon the adverse party within due time. *Sutton v. Symons*, 100 Cal. 576. A notice of intention to vacate the judgment is not a notice of intention to move for a new trial. *Little v. Jacks*, 67 Cal. 165.

<sup>7</sup> *Roussin v. Stewart*, 33 Cal. 208; *Sawyer v. San Francisco*, 50 id. 370; *People v. Center*, 61 id. 191.

<sup>8</sup> *Burnett v. Stearns*, 50 Cal. 468.

<sup>9</sup> *Clark v. Gridley*, 49 Cal. 108; *Hale v. Coveny*, id. 555.

<sup>10</sup> *Towdy v. Ellis*, 22 Cal. 650. See "Time, Extension of," *post*. Notice of decision and service of. See *Blagi' v. Howes*, 66 Cal. 469; *Duff v. Duff*, 71 id. 513; *Waddingham v. Tubbs*, 95 id. 249; *Sullivan v. Wallace*, 73 id. 307; *Gray v. Winker*, 77 id. 525. Where the defeated party gives notice of his intention to move for a new trial without waiting for the service upon him of a notice of the decision he thereby waives such notice. *Thorne v. Finn*, 69 Cal. 251; but see *Keane v. Murphy*, 19 Nev. 97; *Burlock v. Shupe*, 5 Utah, 428.

<sup>11</sup> Cal. Code Civ. Pro., § 1010; *Bear River, etc., Co. v. Boles*, No. 1, 24 Cal. 356; *Killip v. Empire Mill Co.*, 2 Nev. 34. Under Utah practice, the notice of intention to move for a new trial stands for the formal motion, and after the notice has been given the motion may be called up to be heard without a written motion having been made. *East v. Mooney*, 7 Utah, 414; *Needham v. City*, id. 319; and see *Wasel v. Railway Co.*, 13 Mont. 500; *People v. Ah Sam*, 41 Cal. 645.

<sup>12</sup> Id., § 1015.

<sup>13</sup> *Frost v. Meetz*, 52 Cal. 664.

<sup>14</sup> *Prescott v. Salthouse*, 53 Cal. 221.

the statement.<sup>15</sup> A notice stating as a ground of the motion the insufficiency of the evidence to sustain the "judgment," or that the "judgment" is against law, is improper; for the motion is not directed at the judgment, but at the verdict or other decision of fact.<sup>16</sup> Notice of intention, filed within the statutory time, gives the court jurisdiction so far as to be able to dispose properly of the motion for new trial, even if the term is adjourned; but if no notice is filed, then the court loses jurisdiction of the case.<sup>17</sup> The court can not order notice filed *nunc pro tunc*.<sup>18</sup> The ten days do not begin to run till written notice of the rendering of the decision has been served.<sup>19</sup> A party can not abandon his first notice and file a second.<sup>20</sup> Failure to file and serve notice of intention on the opposite party within the time prescribed is a waiver of right to move for a new trial.<sup>21</sup>

§ 4858. **Notice as a stay of proceedings.** A motion for a new trial will not suspend an injunction.<sup>22</sup> If the plaintiff is entitled to an injunction, and obtain one before the trial, he is entitled to retain it upon the cause being remanded for a new trial.<sup>23</sup> Nor, after court has filed its findings and sent the case to a referee, will it stay the proceedings pending before said referee.<sup>24</sup>

<sup>15</sup> *Street v. Lemon M. & M. Co.*, 9 Nev. 251. Sufficiency of notice of intention. See *Hughes v. Alsip*, 112 Cal. 587; *Cook v. Sudden*, 94 id. 443; *Mazkewitz v. Pimentel*, 83 id. 450; *Boston Tunnel Co. v. McKenzle*, 67 id. 485; *Parker v. Doray*, 98 id. 315; *Hill v. Beatty*, 61 id. 292; *O'Connell v. Hotel Co.*, 90 id. 515; *Hibernian, etc., Soc. v. Moore*, 68 id. 156; *Heinlen v. Hellbron*, 71 id. 557; *Dawes v. Powers*, 5 Mont. 59; *State v. Fry*, 10 id. 407; *Hall v. Harris*, 1 S. Dak. 279; *Register Co. v. Pfister*, 5 id. 143; *Stevens v. Higginbotham*, 6 Utah, 215; *Locke v. Moulton*, 96 Cal. 21. If the notice distinctly and unmistakably gives the information that a new trial is asked for, it is sufficient. Id. The notice may state, conjunctively, two or more, or all, of the grounds given by statute. But to put the notice in the alternative, leaving it uncertain which of several grounds appellant relies on, would be objectionable. *Gamer v. Glenn*, 8 Mont. 371.

<sup>16</sup> *Martin v. Matfield*, 49 Cal. 42.

<sup>17</sup> *Killip v. Empire Mill Co.*, 2 Nev. 34.

<sup>18</sup> Id.

<sup>19</sup> *Roussin v. Stewart*, 33 Cal. 208; *Carpentier v. Thurston*, 30 id. 123.

<sup>20</sup> *Le Roy v. Rasette*, 32 Cal. 171.

<sup>21</sup> *Bear River, etc., Co. v. Boles*, No. 1, 24 Cal. 354; *Caney v. Silverthorne*, 9 id. 67; *Elsasser v. Hunter*, 26 id. 279.

<sup>22</sup> *Ortman v. Dixon*, 9 Cal. 23.

<sup>23</sup> *Hess v. Winder*, 34 Cal. 270.

<sup>24</sup> *Crowther v. Rowlandson*, 27 Cal. 376.

§ 4859. **Notice must be given or waived.** Notice must be either given or waived to give jurisdiction.<sup>25</sup> And unless the record contains evidence of the service of the notice, or it clearly appears that service of the notice was waived, the court has no jurisdiction of the motion.<sup>26</sup> If no notice is given of an intention to move for a new trial, a statement made and filed and agreed to by the parties, or settled by the judge, can not be made the foundation of a motion, nor annexed to the record of the judgment or order from which the party may appeal.<sup>27</sup> But where the attorneys stipulate in writing appended to the statement that "the foregoing statement is a true and correct statement on motion for a new trial; that upon said statement the said court did, on, etc., overrule the plaintiff's motion for a new trial and refuse to grant the plaintiffs a new trial, to which plaintiffs then and there excepted; and further, that the judgment-roll, etc., and the aforesaid statement on motion for a new trial and this stipulation, is a true and correct transcript on appeal, and may be used without further certificate," etc.—a notice may be presumed to have been given, though none appears on the record.<sup>28</sup>

§ 4860. **Time, extension of.** Time to give notice of intention may be extended thirty days.<sup>29</sup> An order extending the time to prepare and file a motion extends the time to give notice of motion for a new trial; and an order extending the time for more than the period allowed by statute is good for the statutory extension.<sup>30</sup>

§ 4861. **Waiver of notice.** The filing of a counter-statement is a waiver of objection to a want of notice of intention.<sup>31</sup> But if the record does not show that the party resisting applica-

<sup>25</sup> *Bear River, etc., Co. v. Boles*, No. 1, 24 Cal. 354. No motion for a new trial can be entertained where no notice of intention was given, as prescribed by the Code. *Matter of Philbrook*, 108 Cal. 14; and see *Gould v. Elevator Co.*, 2 N. Dak. 216.

<sup>26</sup> *Calderwood v. Brooks*, 28 Cal. 151.

<sup>27</sup> *Flateau v. Lubeck*, 24 Cal. 364.

<sup>28</sup> *Godchaux v. Mulford*, 26 Cal. 316; 85 Am. Dec. 178; see *Hart v. Kimball*, 72 Cal. 283; *Rutherford v. Talent*, 6 Mont. 112.

<sup>29</sup> Cal. Code Civ. Pro., § 1054; *Harper v. Minor*, 27 Cal. 107.

<sup>30</sup> *Cottle v. Leitch*, 43 Cal. 320; see § 4401, *ante*. Extension of time for filing statement does not extend the time for filing notice of motion for new trial. *McGrath v. Tallent*, 7 Utah, 256.

<sup>31</sup> *Williams v. Gregory*, 9 Cal. 76.

tion for a new trial proposed amendments to the statement, or participated in its settlement, waiver of service will not be presumed.<sup>32</sup>

§ 4862. **Motion on affidavits.** When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions in the foregoing notice of intention, it must be made upon affidavits.<sup>33</sup> If the motion is to be made upon affidavits the moving party must, within ten days after serving the notice, or such further time as the court in which the action is pending or a judge thereof may allow, file such affidavit with the clerk, and serve a copy upon the adverse party, who shall have ten days to file counter-affidavits, a copy of which must be served upon the moving party.<sup>34</sup>

§ 4863. **Affidavit on ground of irregularity.**

*Form No. 1150.*

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled action.

II. The jury was irregularly impaneled in the said cause, having been selected by the sheriff from the bystanders, and not from the body of the county; that no *venire* was issued in said cause, nor return thereon made by the sheriff of said county.

<sup>32</sup> *Calderwood v. Brooks*, 28 Cal. 151; see, also, as to waiver, § 4832, *ante*; *Cereghino v. Cereghino*, 4 Utah, 100; *People v. Carter*, 64 Cal. 561. Waiver of irregularity in the notice of intention. See *Christy v. Water Works*, 68 Cal. 73 *Savings, etc., Soc. v. Moore*, 68 *id.* 156.

<sup>33</sup> Cal. Code Civ. Pro., § 658. When a new trial is granted upon a particular ground, there must be some legal evidence that such cause for a new trial exists, and the ground must be a legal ground for granting a new trial. *Braithwaite v. Alken*, 2 N. Dak. 57. When the motion is made on the grounds of irregularity in the proceedings of the jury, and misconduct of the jury, it must be upon affidavits. *Benjamin v. Stewart*, 61 Cal. 605.

<sup>34</sup> *Id.*, § 659, subd. 1. The time within which counter-affidavits may be filed is not jurisdictional, but is only a rule of procedure subject to the equitable control of the court. *Smith v. Whittier*, 95 Cal. 279. The court may allow them to be filed after the time limited by the statute, under a showing that they had been prepared and served, and that the filing was omitted through oversight or mistake. *Spottiswood v. Weir*, 80 Cal. 448.

Or, II. That the jury, after having retired, were permitted to come into court and receive instructions during the absence of the defendant herein, and of his counsel.

[JURAT.]

[SIGNATURE.]

§ 4864. **Application, grounds of.** Application for new trial may be made because of irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion, by which either party was prevented from having a fair trial.<sup>35</sup> The irregularity mentioned must be distinguished from errors of law, as the motion, if made on the latter ground, is not based on affidavit.<sup>36</sup>

§ 4865. **Abuse of discretion.** Under certain circumstances, it has been held an abuse of discretion for the court to refuse to allow the defendant permission to verify his answer, and grant a motion to strike it out, when the cause came on for trial, no objection having been made to it before that time.<sup>37</sup> But an enlarged discretion is given to lower courts in the conduct of their business, with which an appellate court will not interfere, unless it affirmatively appear that injustice has been done.<sup>38</sup>

§ 4866. **Adverse party, misconduct of.** A motion for a new trial for misconduct of the opposite party must be accompanied by an affidavit of the facts relied on.<sup>39</sup> Where counsel is allowed to read to the jury as a part of his opening statement, against the objection of the opposite party, matter which is not competent as evidence, and which is afterwards excluded when offered as evidence, it is an irregularity entitling the party injured to a new trial.<sup>40</sup> So, also, where counsel is permitted to use abusive language towards a prisoner and insinuate that he did not dare stand a fair and impartial trial, held that it created

<sup>35</sup> Id., § 657, subd. 1.

<sup>36</sup> See *Wilcoxson v. Burton*, 27 Cal. 232, 238.

<sup>37</sup> *Lattimer v. Ryan*, 20 Cal. 628.

<sup>38</sup> *Broadus v. Nelson*, 16 Cal. 79.

<sup>39</sup> *Pagnetel v. Gauche*, 17 La. Ann. 63. Where the defendant, sheriff of the county, mingled with and conversed with jurors while they were deliberating upon their verdict, and in the charge of a sworn balliff, no reasonable excuse appearing therefor, such defendant is guilty of such irregularity as to justify the court in granting a new trial. *Peterson v. Siglinger*, 3 S. Dak. 255; see, also, *People v. Myers*, 70 Cal. 582.

<sup>40</sup> *Scripps v. Reilly*, 34 Mich. 384; 22 Am. Rep. 533; *Lindsay v. Pettigrew*, 3 S. Dak. 199.



a prejudice against the prisoner and entitled him to a new trial.<sup>41</sup> Improper conduct on the part of the prevailing party towards a witness, as by threats, persuasions, etc., is a ground for new trial.<sup>42</sup> Or the production of an interested witness, known to be such, without disclosing the circumstance.<sup>43</sup> If defendant, without objection, permits plaintiff's counsel to draw inferences which he deems unfair and unjust, or to indulge in argument calculated to improperly influence, prejudice, or mislead the jury, it is too late after verdict to rely upon it as grounds for a new trial.<sup>44</sup> Also where plaintiff had erred in practice, through erroneous advice of counsel, a new trial will be ordered.<sup>45</sup> But this does not seem to be a good reason for a new trial. Disorderly conduct on part of spectators, calculated to influence the jury, as being a manifestation of popular feeling, or which prevents the jury from hearing the charge, *quaere*.<sup>46</sup> A new trial awarded in a peculiar case on the ground that the case had not been fully considered in certain important aspects.<sup>47</sup>

§ 4867. **Affidavits must be identified.** When an order is made granting a new trial, on affidavits, if the affidavits are not identified so as to entitle them to be considered on appeal, the order will be reversed.<sup>48</sup> And the identification must show that they were read or referred to on the argument; the ordinary indorsement of filing by the clerk is not sufficient.<sup>49</sup>

<sup>41</sup> State v. Smith, 75 N. C. 306.

<sup>42</sup> Owen v. Atkinson, 7 Mod. 156.

<sup>43</sup> Niles v. Brackett, 15 Mass. 378.

<sup>44</sup> Ames v. Potter, 7 R. I. 265.

<sup>45</sup> Rogers v. Niagara Ins. Co., 2 Hall, 559. **Alleged incapacity of attorney, on account of his intoxication, as ground for new trial.** See Fitch v. Ellison, 15 Col. 418. The failure of an attorney to prepare for the trial in consequence of a conversation had with the adverse attorney, by which he is misled into the belief that the trial would be postponed, is excusable neglect warranting a new trial. Symons v. Bunnell, 80 Cal. 330.

<sup>46</sup> Conrad v. Williams, 6 Hill, 444.

<sup>47</sup> Mills v. Van Voorhis, 20 N. Y. 412; S. C., 10 Abb. Pr. 152. **Improper conduct of party, calculated to influence the jury, is ground for new trial.** Burke v. McDonald, 2 Idaho, 1022; Palmer v. Railway Co., id. 290.

<sup>48</sup> Dean v. Pritchard, 9 Nev. 231; State v. Parsons, 7 id. 57.

<sup>49</sup> Johnson v. Muir, 43 Cal. 542. The present California Code of Civil Procedure differs in its terms from the former Practice Act, under which the above decision was rendered. See Bagnall v. Roach, 76 Cal. 106.

§ 4868. **Exceptions must be taken.** A new trial will not be granted where one of the jurors was a stockholder in the company defendant, if the fact was known to counsel for plaintiff before entering on the trial, and no objection was made until after the trial had proceeded for some time.<sup>50</sup> Nor for interest of a juror, if known to counsel before the trial.<sup>51</sup> Nor that judge is not impartial, if then known to counsel.<sup>52</sup> The absence of a juror, and suspension of examination thereby without objection, is held no objection to the verdict.<sup>53</sup>

§ 4869. **Grounds of motion.** A new trial will be ordered when there is such irregularity in the proceedings that the ends of justice will be better subserved.<sup>54</sup> It is within the discretion of the court to set aside a verdict in consequence of irregularity in the conduct of the jury.<sup>55</sup> The misconduct must be shown, and it must be shown to have resulted to the injury of the party against whom verdict was rendered.<sup>56</sup> So in a criminal case,<sup>57</sup> if the misconduct or irregularity is satisfactorily proved, positive injury need not be shown.<sup>58</sup> Where the judgment was rendered at nine A. M. upon a summons citing defendant to appear at ten A. M. a new trial will be ordered.<sup>59</sup> So, also, if after the jury has once retired, they are allowed to come into court and receive instructions in the absence of the parties or their coun-

<sup>50</sup> *Orrok v. Commonwealth Ins. Co.*, 21 Pick. 456; 32 Am. Dec. 271.

<sup>51</sup> *Kent v. Charlestown*, 2 Gray, 281.

<sup>52</sup> *Crosby v. Blanchard*, 7 Allen, 385.

<sup>53</sup> *Eastman v. Tuttle*, 1 Cow. 248; *Ex parte Hill*, 3 Id. 355; *Steward v. Kinkel*, 72 Cal. 187; see "Exceptions," *ante*.

<sup>54</sup> *Sannickson v. Brown*, 5 Cal. 58; 63 Am. Dec. 82.

<sup>55</sup> *United States v. Gillies*, Pet. C. C. 159; *Knight v. Freeport*, 13 Mass. 218; *McIlvaine v. Wilkins*, 12 N. H. 474, 476; *People v. Douglas*, 4 Cow. 26; 15 Am. Dec. 332; *Wright v. Burchfield*, 3 Ohio, 53; *Smith v. Harrow*, 3 Bibb, 446; *Reynolds v. The Champ. Trans. Co.*, 9 How. Pr. 7; *Cain v. Cain*, 1 B. Mon. 213; *Hanks v. State*, 21 Tex. 526; *Drummond v. Leslie*, 5 Blackf. 453; *Busick v. State*, 19 Ohio, 198.

<sup>56</sup> *Smith v. Thompson*, 1 Cow. 221; *Horton v. Horton*, 2 Id. 589; *Oliver v. First Presbyterian Church*, 5 Id. 283; *Wilson v. Abrahams*, 1 Hill, 207; *Harrison v. Price*, 22 Ind. 165. A new trial will not be granted merely on the ground of harmless error *Gaynor v. Clements*, 16 Ool. 209.

<sup>57</sup> *Whelchell v. State*, 23 Ind. 89.

<sup>58</sup> *Johnson v. Root*, 2 Fish. Pat. Cas. 291; compare *Henry v. Ricketts*, 1 Cranch C. C. 545; *Madden v. State*, 1 Kan. 340.

<sup>59</sup> *Parker v. Shephard*, 1 Cal. 132.

sel.<sup>60</sup> If the court, after the case is submitted, examines books of account as evidence which have not been given in evidence during the trial, the "irregularity" must be stated in the record to be one of the grounds on which motion will be made for a new trial.<sup>61</sup> Where it is evident the jury acted under a mistaken impression as to the legal effect of the evidence, or in total disregard of it, a new trial will be granted.<sup>62</sup> Or where it is manifest from the testimony that the verdict of the jury must have been given under a state of great excitement.<sup>63</sup> But that one of the jurors "knew and was aware of the circumstances connected with the affair," if no objection to him was made until after verdict rendered, is not sufficient ground.<sup>64</sup>

§ 4870. *Irregularities.* If the character of a witness is called in question during the trial, it is an irregularity for the judge to make a remark from the bench indorsing the respectability of the witness, and if the testimony of the witness is material, judgment would be reversed for such irregularity; but if the testimony be immaterial, the judgment will not be reversed, though the conduct of the judge be disapproved.<sup>65</sup> In a trial by the court, if testimony be admitted on the hearing against the objections of a party, and afterwards on the determination of the cause the court exclude such testimony from its consideration, it is an irregularity, for the parties are entitled to have the case determined in accordance with the ruling at the trial.<sup>66</sup> Where the jury, after having been out for a long time considering of their verdict, return into court and report that they are unable to agree, and the court gives them further instructions, closing with the remark, "You must agree upon a verdict: I can not discharge you until you agree upon a verdict," and the jury soon return with a verdict of no cause of action, the verdict was set aside as obtained by constraint.<sup>67</sup> After a jury retires for deliberation, it is error for the judge trying the cause to send a

<sup>60</sup> *Redman v. Gulnac*, 5 Cal. 148.

<sup>61</sup> *Wilcoxson v. Burton*, 27 Cal. 237; 87 Am. Dec. 66.

<sup>62</sup> *Minturn v. Burr*, 20 Cal. 48.

<sup>63</sup> *People v. Acosta*, 10 Cal. 195.

<sup>64</sup> *Lawrence v. Colliers*, 1 Cal. 37.

<sup>65</sup> *McMinn v. Whelan*, 27 Cal. 319.

<sup>66</sup> *Carpentier v. Small*, 35 Cal. 364.

<sup>67</sup> *Slater v. Mead*, 53 How. Pr. 57; and see, also, *Mahoney v. Railway Co.*, 110 Cal. 471.

communication to them, unless by consent of counsel on both sides, and the better practice is to communicate in open court.<sup>68</sup>

§ 4871. *Insufficient grounds.* It is no ground for setting aside a verdict that there were good grounds of challenge to a juror;<sup>69</sup> nor that the court rejected a competent juror;<sup>70</sup> nor the withdrawal of a juror, and the continuance of a case thereby.<sup>71</sup> Or where the officer in charge permits a juror to go into his own house to change his linen, if in sight of the officer.<sup>72</sup> The bare fact that evidence is brought to the notice of the jury out of its regular order<sup>73</sup> is insufficient. Where the attorney for the prevailing party, at the request of one of the jurors, after their retirement, sent for a bottle of liniment which had been prepared for the juror to relieve his pain, and the liniment was passed in by the officer, it was held that this was not such an irregularity as would vitiate the verdict.<sup>74</sup> There is a marked distinction between the performance of an act of humanity or duty towards a juror and the voluntary offer of civilities, such as treating with spirituous liquors.<sup>75</sup> The fact that instructions given by the court are lost or mislaid is no ground for a motion for new trial.<sup>76</sup> Nor that a deposition alleged to contain material matter was lost, if not used on the trial.<sup>77</sup> If a juror, before retiring, asks the clerk as to a fact appearing from the records, and no objection is made, a new trial should not be granted.<sup>78</sup> Calling in the clerk to inquire if they were correctly

<sup>68</sup> *Plunkett v. Appelton* 51 How. Pr. 469. No objection to the temporary absence of the judge from the courtroom during a portion of the trial can be considered, if the motion for new trial is not made on the ground of irregularity, and the objection was not urged at the time. *O'Callaghan v. Bode*, 84 Cal. 489.

<sup>69</sup> *Thompson v. Paige* 16 Cal. 77; *Hollingsworth v. Duane*, Wall. C. C. 147.

<sup>70</sup> *West v. Forrest*, 22 Mo. 344.

<sup>71</sup> *Benedict v. Cozzens*, 4 Cal. 382.

<sup>72</sup> *State v. O'Brien*, 7 R. I. 336.

<sup>73</sup> *Rice v. Cunningham*, 29 Cal. 492.

<sup>74</sup> *Carnaghan v. Ward*, 8 Nev. 30. The sickness of a juror during the trial which is not so severe as to incapacitate him from performing his duties, is not ground for a new trial. *People v. Brown*, 76 Cal. 573.

<sup>75</sup> *Id.* The latter was held sufficient to set aside the verdict in *Sacramento, etc., M. Co. v. Showers*, 6 Nev. 291.

<sup>76</sup> *Visher v. Webster*, 13 Cal. 58.

<sup>77</sup> *Chapman v. Chapman*, 4 Call. 430.

<sup>78</sup> *Allen v. Blunt*, 2 Woodb. & M. 121, 147.

informed how to make the computation, no injury resulting,<sup>79</sup> is not sufficient grounds. Where a slip of newspaper was handed by the deputy sheriff to the jury during the trial, containing matters relating to the trial, and the court subsequently instructed the jury that the slip was not in evidence, and should be wholly disregarded, and it appeared that the perusal could not have prejudiced the losing party, it was held not ground for new trial.<sup>80</sup> In Illinois, where the sheriff communicates with the jury by remarks, he may be fined.<sup>81</sup> Or where juror read report of the cause in a newspaper to which he was a regular subscriber, it is not sufficient grounds,<sup>82</sup> or had heard the case discussed, if the objection be not raised at the proper time.<sup>83</sup> Where the interference of strangers with the jury is unattended with corruption in the latter, and has not been prompted by a party, and it does not appear that any injustice has thereby been done, it is not sufficient.<sup>84</sup> Where a sealed verdict was given to the officer in charge of the jury, the clerk being absent, which was given to the clerk next morning, and the next morning the verdict is opened in presence of the jury and read by the clerk, without exception, it is not sufficient ground for a new trial.<sup>85</sup> A new trial will not be granted in a criminal case because sheriff takes charge of the jury where a deputy sheriff was sworn, nor because the judge informs the jury, through the sheriff, that if they do not agree in five minutes they must remain in the jury-room over night.<sup>86</sup>

§ 487½. **Taking out papers.** If the jury take out plaintiff's account without the consent of the defendant, the court will grant a new trial.<sup>87</sup> But if the papers taken out without consent are not read by the jury, it is held no ground for setting aside

<sup>79</sup> *Dennison v. Powers*, 35 Vt. 39.

<sup>80</sup> *Thrall v. Smiley*, 9 Cal. 529; see, also, to the same effect, *United States v. Gilbert*, 2 Sumn. 19.

<sup>81</sup> *Reins v. People*, 30 Ill. 256.

<sup>82</sup> *United States v. Reid*, 12 How. (U. S.) 361.

<sup>83</sup> *State v. Daniels*, 44 N. H. 383.

<sup>84</sup> *People v. Boggs*, 20 Cal. 432; affirmed in *People v. Symonds*, 22 id. 353; but see *Nesmith v. Clinton Fire Ins. Co.*, 8 Abb. Pr. 141; compare *People v. Murray*, 85 Cal. 350.

<sup>85</sup> *Palge v. O'Neal*, 12 Cal. 483.

<sup>86</sup> *People v. Hughes*, 29 Cal. 257.

<sup>87</sup> *Hutchinson v. Decatur*, 3 Cranch C. C. 291; see, also, *United States v. Clark*, 2 id. 152; *contra*; *Simms v. Templeman*, 5 id. 163.

the verdict.<sup>88</sup> Or that they took out through mistake a deposition which was irrelevant and immaterial to the issue. *Aliter* if it was delivered to the jury, by the counsel of the party in whose favor verdict was rendered.<sup>89</sup> The jury having found a sealed verdict, but upon being polled one of them dissented, on being sent out for further deliberation they returned all concurring in the same verdict, it was held no irregularity.<sup>90</sup> The mere fact that a juror attempts to communicate the verdict to a party in whose favor it is rendered, before its announcement, is not sufficient ground for setting a verdict aside.<sup>91</sup>

§ 4873. Affidavit on ground of the misconduct of the jury.

*Form No. 1151.*

[TITLE.]

[VENUE.]

L. M., being duly sworn, deposes and says as follows:

The jury impaneled in the above-entitled cause, in finding their verdict in the same, resorted to the determination of chance, to-wit [each juror threw dice, upon an agreement that the one who threw the highest number should name the verdict, whereupon Q. R. threw the highest number and fixed the verdict.]

[JURAT.]

[SIGNATURE.]

§ 4874. Affidavit. Whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.<sup>92</sup> The affidavit need not be made by a juror guilty of the misconduct complained of.<sup>93</sup> And it seems it may be made by the sheriff having the jury in charge.<sup>94</sup> Being in derogation of the common law, this statute must be strictly construed, and will only be allowed in case of a chance verdict.<sup>95</sup>

<sup>88</sup> Hackley v. Hastie, 3 Johns. 252; compare Mitchell's Case, 1 City Hall Rec. 147.

<sup>89</sup> Lonsdale v. Brown, 4 Wash. O. C. 148.

<sup>90</sup> Bunn v. Hoyt, 3 Johns. 255; Douglass v. Tousey, 2 Wend. 352.

<sup>91</sup> Fash v. Byrnes, 14 Abb. Pr. 12.

<sup>92</sup> Cal. Code Civ. Pro., § 657, subd. 2.

<sup>93</sup> Donner v. Palmer, 23 Cal. 48.

<sup>94</sup> Wilson v. Berryman, 5 Cal. 44; 63 Am. Dec. 78.

<sup>95</sup> Turner v. Tuolumne County Water Co., 25 Cal. 400.

§ 4875. **Chance verdict.** The verdict to which the assent of any of the jurors was obtained by a resort to chance will be set aside.<sup>96</sup> Where the jury entered into an agreement that each should mark down upon a separate piece of paper the amount which he thought the plaintiff was justly entitled to recover, which amounts, after being added together, should be divided by twelve, and that the quotient should be their verdict, is a chance verdict, if they agree to be bound by the result.<sup>97</sup> It is not a chance verdict within the meaning of the statute, and the affidavits of jurors can not be received to impeach it.<sup>98</sup> That is not a chance verdict, if they do not agree to be bound by the result, but reserve to themselves the right to dissent.<sup>99</sup> Where a portion of the jury are induced to assent by drawing lots, it is a chance verdict.<sup>100</sup> So, also, where their assent is obtained by matching coins.<sup>101</sup>

§ 4876. **Misconduct.** Separation of the jury is not, in the absence of any appearance of prejudice to the party complaining of it, ground for a new trial, or where there is no ground of suspicion that they have been tampered with;<sup>102</sup> even if verdict be subsequently modified.<sup>103</sup> Otherwise where there is a sus-

<sup>96</sup> *Donner v. Palmer*, 23 Cal. 40.

<sup>97</sup> *Wilson v. Berryman*, 5 Cal. 44; 63 Am. Dec. 78; *Mulocke v. Lawrence*, 5 City Hall Rec. 85; *Denton v. Lewis*, 15 Iowa, 301; *Schoolfield v. Brunton*, 20 Col. 139.

<sup>98</sup> *Turner v. Tnolumne County Water Co.*, 25 Cal. 400; *Boyce v. Cal. Stage Co.*, id. 473; *Hoare v. Hindley*, 49 id. 274; see *post*, "Impeaching Verdict;" also, § 4692, *ante*.

<sup>99</sup> *Wilson v. Berryman*, 5 Cal. 44; 63 Am. Dec. 78; *Lee v. Clute*, 10 Nev. 149; *Conklin v. Hill*, 2 How. Pr. 6; *Fowler v. Colton*, Burn. 175; *Barton v. Holmes*, 16 Iowa, 252.

<sup>100</sup> *Levy v. Brannan*, 39 Cal. 485.

<sup>101</sup> *Donner v. Palmer*, 23 Cal. 40; see, as to chance verdict, § 4692, *ante*, where the cases are collated.

<sup>102</sup> *Ex parte Hill*, 3 Cow. 355; *People v. Douglass*, 4 id. 26; 15 Am. Dec. 332; *Everett v. Youells*, 4 Barn. & Adol. 681; *State v. Barton*, 19 Mo. 227; *State v. Harlow*, 21 id. 446; *State v. Igo*, id. 459; *Green v. Bliss*, 12 How. Pr. 428; *Oliver v. First Presb. Ch.*, 5 Cow. 283; *Smith v. Thompson*, 1 id. 221; *Horton v. Horton*, 2 id. 589; *Perkins v. Ermel*, 2 Kan. 325; *Anthony v. Smith*, 4 Bosw. 503; *People v. Moore*, 41 Cal. 238.

<sup>103</sup> *Nims v. Bigelow*, 44 N. H. 376; *Nininger v. Knox*, 8 Minn. 140; *Dozenback v. Raymer*, 13 Col. 451; *Kirley v. Telegraph Co.*, 4 S. Dak. 105.



picion of abuse.<sup>104</sup> Where a juror drinks liquor as a remedy for disease, after retiring in charge of the officer, a new trial will be granted.<sup>105</sup> And in Arkansas it has been held that the mere fact that one of the jury, during the trial, in company with the officer, visited a saloon and took a glass of liquor, will not be sufficient ground of itself for granting a new trial, unless it appear that the defendant was prejudiced, although such conduct is reprehensible.<sup>106</sup> Proof of declarations of juror made after verdict can not be received for the purpose of impeaching it.<sup>107</sup> A conversation of a juror with any person in regard to the trial, in order to vitiate the verdict, must have been of such a nature as to impress the case on the juror's mind in an aspect different from that presented by the evidence.<sup>108</sup> The mere disclosure of the verdict by the juror, after it has been agreed upon, sealed, and delivered to the clerk, although reprehensible, is not sufficient of itself to invalidate the verdict.<sup>109</sup> The amendment

<sup>104</sup> *Oliver v. First Presb. Ch.*, 5 Cow. 283.

<sup>105</sup> *Brant v. Fowler*, 7 Cow. 562; *State v. Baldy*, 17 Iowa, 39; *State v. Bullard*, 16 N. H. 139. The propriety of this rule is doubted in *Wilson v. Abrahams*, 1 Hill, 208; and in *Harrison v. Rowan*, 4 Wash. C. C. 32, it was held that the mere fact of the jurors having taken refreshments, if not furnished by either party to the suit, was not sufficient ground to set aside the verdict. Nor when prisoner's counsel consented in open court to this indulgence, unless shown that the indulgence was grossly abused, and operated injuriously to the prisoners. *United States v. Gilbert*, 2 Sumn. 19.

<sup>106</sup> *Kee v. State*, 28 Ark. 155; *Roman v. State*, 41 Wis. 312; *Russell v. State*, 53 Miss. 367; but see *March v. State*, 44 Tex. 64; *Vollrath v. Crowe*, 9 Wash. St. 374. Intoxication of juror as ground for new trial. *Ipswitch v. Fernandez*, 84 Cal. 639. Intoxication of judge and jury. *Repath v. Walker*, 13 Col. 109. The fact that during the trial one of the jurors was accused of a grave crime, and employed one of the counsel for the successful party to defend him, is not ground for a new trial, where it does not appear that the juror was rendered incompetent or failed to give due attention to the testimony and arguments. *Hill v. Corcoran*, 15 Col. 270. Improper discussion of case by jury before its final submission. See *Monaghan v. Rolling Mill Co.*, 81 Cal. 190. Visiting the premises by the jury to enable them to understand the evidence introduced on the trial can not deprive the court of its jurisdiction to grant a new trial, which it should do, notwithstanding a conflict in the evidence, if fully convinced that the verdict was wrong. *McQueen v. Mechanics' Institute*, 107 Cal. 163.

<sup>107</sup> *Hollingsworth v. Duane*, Wall. C. C. 174.

<sup>108</sup> *March v. State*, 44 Tex. 64; see, also, *Taylor v. State*, 52 Miss. 84.

<sup>109</sup> *Ingersoll v. Truebody*, 40 Cal. 603.



of 1862 to section 193 of the California Practice Act, allowing the affidavits of the jurors to be received to impeach their own verdict, relates merely to the remedy, and governs in all applications for new trials made after its passage, although the verdict and judgment sought to be set aside were rendered previously.<sup>110</sup>

§ 4877. **Impeaching verdict.** Ordinarily the affidavits of jurors are not admissible to impeach their verdict, either for error or mistake in respect to their verdict, nor for irregularity or misconduct of themselves or their fellows,<sup>111</sup> or to show they intended something different,<sup>112</sup> except under special circumstances;<sup>113</sup> as where mistake arises from misdirection of the judge, or conduct equivalent thereto.<sup>114</sup> But where the foreman of the jury by mistake announces a verdict different from that agreed upon, the affidavit of jurors may be introduced to establish that fact if the application be made at once to the court to correct the record to conform to the actual finding.<sup>115</sup> By the California Code of Civil Procedure, section 657, subdivision 2, the affidavit of a juror may be used to prove a resort to chance in determining the verdict; but this statute, being in derogation of the common law, must be strictly construed, and will not be held to include such kinds of misconduct as do not come clearly within the descriptive terms of the statute.<sup>116</sup> But such affidavits may be received to show improper conduct of success-

<sup>110</sup> *Donner v. Palmer*, 23 Cal. 40; see § 4874, *ante*.

<sup>111</sup> 1 T. R. 11; 2 *id.* 281.

<sup>112</sup> 2 Tidd, 817; *Sargent v. —*, 5 Cow. 121; *Rex v. Woodfall*, 5 Burr, 2667; *Turner v. Tuolumne Water Co.*, 25 Cal. 400; *People v. Hughes*, 29 *id.* 257; *Boyce v. California Stage Co.*, 25 *id.* 473; *Clum v. Smith*, 5 Hill, 560; *Ladd v. Wilson*, 1 Cranch C. C. 305; *Green v. Bliss*, 12 How. Pr. 428; *Dana v. Tucker*, 4 Johns. 487; *Reins v. People*, 30 Ill. 256; *Brownell v. McEwen*, 5 Den. 367; *Cline v. Broy*, 1 Oreg. 89; *People v. Columbia Com. Pleas*, 1 Wend. 297; *Jackson v. Dickenson*, 15 Johns. 309; 8 Am. Dec. 236; *Hughes v. Listner*, 23 Ind. 396; *Edmiston v. Garrison*, 18 Wis. 594; *Taylor v. Everett*, 2 How. Pr. 23.

<sup>113</sup> *Little v. Birdwell*, 21 Tex. 597; 73 Am. Dec. 242.

<sup>114</sup> *Ex parte Caykendall*, 6 Cow. 53.

<sup>115</sup> *Dalrymple v. Williams*, 63 N. Y. 361; 20 Am. Rep. 544; see, further, "Verdict," *ante*.

<sup>116</sup> *Turner v. Tuolumne Water Co.*, 25 Cal. 400; see, also, *Hoare v. Hindley*, 49 *id.* 274; and see, as regards affidavits to impeach verdict, § 4874, *ante*; also, *People v. Azoff*, 105 Cal. 632. Counter-affidavits, see *Smith v. Whittier*, 95 *id.* 280.

ful party in approaching them on the subject;<sup>117</sup> or they may be introduced to sustain the verdict,<sup>118</sup> but not to show that they misunderstood its effect.<sup>119</sup>

§ 4878. Affidavit on motion — ground of surprise.

*Form No. 1152.*

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled cause.

II. Previous to the trial of said cause, to-wit, on the ..... day of ....., 18.., at ....., one M. N. informed me that he knew and would testify to [state a material point in defense], and relying on said assurance I took no steps to procure other testimony to said fact, and summoned the said M. N. to testify to the same, but the said M. N. when called to the stand at the trial of said cause, by collusion with the plaintiff therein [or state any fact or occurrence for which defendant is not responsible], testified contrary to what he had previously stated he should do, and the verdict, which was against the defendant, was mainly attributable to said testimony, and on a new trial [state material point] will be established by evidence, and a different verdict will result.

III. I am able to prove the same fact by O. P., who resides at ....., and whose testimony I can procure at the new trial of this cause.

[JURAT.]

[SIGNATURE.]

§ 4879. Affidavit. The affidavit on a motion for new trial, on the ground of surprise by nonattendance of witnesses, should set forth particularly and distinctly the facts which the party expects to be able to prove by his witnesses.<sup>120</sup> It must set

<sup>117</sup> Reynolds v. Champlain Trans. Co., 9 How. Pr. 7. A new trial, sought upon the ground of alleged misconduct of a juror in using improper language in the jury-room, is properly denied when such misconduct is attempted to be shown by the affidavit of a third person to whom the juror had stated the circumstances, especially where the use of the language is denied by the affidavit of the juror himself and some of his fellow jurors. State v. Anderson, 14 Mont. 541.

<sup>118</sup> Dana v. Tucker, 4 Johns. 487; see, also, Nesmith v. Clinton Fire Ins. Co., 8 Abb. Pr. 141.

<sup>119</sup> Polhemus v. Helman, 50 Cal. 438.

<sup>120</sup> Rogers v. Hule, 1 Cal. 429; 54 Am. Dec. 300; Warren v. Ritter,

forth due diligence.<sup>121</sup> The facts constituting legal surprise should be shown by the affidavits of the attorney, and not by the client.<sup>122</sup> Where the application is on the ground of surprise by the testimony of a witness, the affidavit should show that such testimony is not true.<sup>123</sup> A new trial will not be granted on affidavit by a witness of mistake in his testimony on the trial, unless there be a clear showing of mistake, and that it was injurious to the party, and that he had no means or had used due diligence to correct it.<sup>124</sup>

§ 4880. **Application, when made.** The general rule is, that a party surprised on the trial must apply for relief at the earliest practicable moment, and in such method as will produce the least vexation, expense, and delay; but the rule may be relaxed where the party has been guilty of no laches, and acts in good faith.<sup>125</sup>

§ 4881. **Grounds of motion.** Accident or surprise, such as ordinary prudence could not have guarded against, is a good ground for a motion for a new trial.<sup>126</sup> But an order denying a new trial on this ground will not be reversed unless there has been an abuse of discretion.<sup>127</sup> The surprise must be some mat-

11 Mo. 354; *Clifford v. Railroad Co.*, 12 Col. 125. The party alleging surprise should show it conclusively. *Gaines v. White*, 2 S. Dak. 410; affirming S. C., 1 id. 434; *Morse v. Swan*, 2 Mont. 306. Necessity of affidavits on the motion. See *Leete v. Sutherland*, 20 Nev. 71; *Orr v. Haskell*, 2 Mont. 225. Continuance must be asked for. *Romero v. Desmarais*, 4 N. Mex. 367. There is no such ground for granting a new trial as mistake or inadvertence, as distinguished from "accident" or "surprise." *Fincher v. Malcolmson*, 96 Cal. 38. The last two terms, as used in legal parlance, have substantially the same meaning. *McGuire v. Drew*, 83 Cal. 225.

<sup>121</sup> *Rogers v. Hule*, 1 Cal. 429; 54 Am. Dec. 300; and see *McLar v. Hapgood*, 85 Cal. 557.

<sup>122</sup> *Schellhous v. Ball*, 29 Cal. 605.

<sup>123</sup> *People v. Jocelyn*, 29 Cal. 562; *Phenix v. Baldwin*, 14 Wend. 62.

<sup>124</sup> *Howe v. Briggs*, 17 Cal. 385.

<sup>125</sup> *Delmas v. Martin*, 39 Cal. 555.

<sup>126</sup> *Patterson v. Ely*, 19 Cal. 28; *Cook v. De la Guerra*, 24 id. 237; *Brooks v. Lyon*, 3 id. 113; *Moore v. L. A. Infirmary*, 49 id. 669; *People v. Marks*, 10 How. Pr. 261; *De Leyer v. Michaels*, 5 Abb. Pr. 203; *Peck v. Hiler*, 30 Barb. 655; *Colorado, etc., Railway Co. v. Bowles*, 14 Col. 85; *Kenezleber v. Wahl*, 92 id. 202; compare *Dewey v. Frank*, 62 id. 343.

<sup>127</sup> *Nooney v. Mahoney*, 30 Cal. 226.

ter of fact, not of law.<sup>128</sup> Thus where one party to an action is misled by the act of the other, justice demands that a new trial should be granted.<sup>129</sup> Where a defendant, whose property has been attached, files an evasive answer under oath, admitting the indebtedness sued on, and then, on a trial between an intervenor and the plaintiff, testifies that the debt was not due, it is sufficient cause for new trial on the ground of surprise.<sup>130</sup> Where a party to an action, previous to the trial, is told by a witness that he will testify in a certain manner to a material fact, and relying on his statement, neglects to procure other testimony, and when called to the stand, the witness, either by collusion, or by any occurrence for which the party calling the witness is not responsible, testifies contrary to what he had previously stated, it is surprise in the sense in which the word is used, provided the party shows that he will be able on the new trial to supply the testimony required.<sup>131</sup> Where it clearly appears that a witness has made a mistake in his testimony upon a material point which was in its nature calculated to and probably did decide the verdict, a new trial will be granted;<sup>132</sup> but not where the witness acknowledging the mistake is only one of several who testify to the same point.<sup>133</sup> Where defendant testified to payment, and plaintiff after such testimony had no time to produce evidence, but afterwards found witnesses who, refreshing their memory from an examination of plaintiff's books, could testify as to what took place at the time and place of the alleged payments, in disapproval of defendant's testimony, it was held good ground for a new trial for surprise

<sup>128</sup> *Craig v. Fanning*, 6 How. Pr. 336; and see *Pierce v. Willis*, 103 Cal. 91; *Pavement Co. v. Bowle*, 104 Id. 286. A party will not be heard to claim that he was surprised by, and for that reason unprepared to meet, the testimony of his adversary as to facts which were specially pleaded. *Fist v. Fist*, 3 Col. App. 273; and see *Francisco v. Benepe*, 6 Mont. 243.

<sup>129</sup> *Pinkham v. McFarland*, 5 Cal. 137; *Jackson v. Warford*, 7 Wend. 62; *Chamberlain v. Lindsay*, 1 Hun, 231; *Haynes v. State*, 45 Ind. 424; *Marsh v. State*, 44 Tex. 64; but see *Jackson v. Van Antwerp*, 8 Cow. 273; *Taylor v. Harlow*, 11 How. Pr. 285.

<sup>130</sup> *Coghill v. Marks*, 29 Cal. 673.

<sup>131</sup> *Rodriguez v. Comstock*, 24 Cal. 25; compare *O'Donnell v. Bennett*, 12 Mont. 242.

<sup>132</sup> *Coddington v. Hunt*, 6 Hill, 595; *Richardson v. Fisher*, 1 Bing. 145.

<sup>133</sup> *Mersereau v. Pearsall*, 6 How. Pr. 293.

and newly-discovered evidence.<sup>134</sup> If a witness absent himself after he has appeared, so that he can not be examined, it is a surprise, and is ground for a new trial.<sup>135</sup> If documents were ruled out which had been read without objection on a former trial, it is a surprise, and good ground for a new trial.<sup>136</sup> And where seduction was sworn to on a certain day, not mentioned in the complaint, and on which day the defendant was able to prove an *alibi*, by witnesses who were not present at the trial, a new trial was granted.<sup>137</sup> Where in a suit for damages in which the defendant answers denying damage in the amount claimed, the court enters judgment for damages, *non obstante veredicto*, after plaintiff had gone into proof as to damages, and the jury had returned a verdict upon the facts for a less amount than that claimed, and less than the amount for which judgment was rendered, it was held that going into proof, etc., might well have induced defendant not to move to amend his answer, which motion the court would probably have granted, and hence defendant might have been taken by surprise.<sup>138</sup> Where plaintiffs were permitted to prove and recover on a title other than the one set up, it was error in the court below to refuse a new trial.<sup>139</sup> Where defendant had a good defense, but was prevented from making it by accident, and without fault on his part, a new trial will be awarded.<sup>140</sup> But where a party lost his opportunity of defense by his own negligence, a new trial will not be granted.<sup>141</sup> So, on a misdirection of the court in a matter not material to the merits of the cause.<sup>142</sup>

<sup>134</sup> Parshall v. Kilnack, 43 Barb. 203; but see Berry v. Metzler, 7 Cal. 418, where it is held to be only ground for a continuance.

<sup>135</sup> Tilden v. Gardiner, 25 Wend. 663; Ruggles v. Hall, 14 Johns. 112. To entitle one who has failed to appear at trial to relief upon the ground of surprise he must show that he has been injured by the trial in his absence, and that a different result would be reached if the judgment were vacated and a new trial had. McGuire v. Drew, 83 Cal. 225.

<sup>136</sup> Helm's Ex'rs v. Jones' Adm'x, 9 Dana (Ky.), 26.

<sup>137</sup> Sargent v. Dennison, 5 Cow. 106.

<sup>138</sup> Reniff v. The Cynthia, 18 Cal. 669.

<sup>139</sup> Eagan v. Delaney, 16 Cal. 85.

<sup>140</sup> Ford v. Ford, Walker (Miss.), 505.

<sup>141</sup> Dodge v. Strong, 2 Johns. Oh. 228; Dorflinger v. Coll, 2 Ham. 311; Hoomes v. Kuhn, 4 Call. 274; Green v. Robinson, 5 How. (Miss.) 80.

<sup>142</sup> Maynor v. Lewis, 2 Ga. Dec. 205.

§ 4882. **Insufficient grounds.** If the party alleging surprise “can relieve himself from embarrassment in any mode, either by nonsuit or a continuance, or the introduction of other testimony, or otherwise, he must not take the chances of a verdict, but must at once fortify his position by resorting to all available modes of present relief.”<sup>143</sup> A party will not be refused a new trial because when taken by surprise at unexpected testimony he did not ask for a continuance, if he had no knowledge at the time of evidence to rebut such testimony.<sup>144</sup> Want of preparation is a ground for continuance, but no ground for a new trial.<sup>145</sup> So where a witness absents himself without leave, and no attachment is asked for, it is no ground for a new trial.<sup>146</sup> Mere surprise at the evidence given by the witnesses of the defendant or of the adverse party is not sufficient ground for a new trial.<sup>147</sup> Or because witnesses did not state facts which the party expected they would state.<sup>148</sup> Especially where it is not shown that proof can be made upon another trial of the facts, of which the want of proof occasioned the surprise.<sup>149</sup> Nor where the plaintiff, testifying in his own behalf, sustains the averment of his own complaint.<sup>150</sup> Surprise at the testimony of a witness in stating a certain conversation incorrectly is no ground for a new trial.<sup>151</sup> A party can not be surprised by his opponent making good by proof the allegations of his plea.<sup>152</sup> Nor at the ruling of the court on the admission of testimony.<sup>153</sup> Nor that the attorney was mistaken as to the time of the meeting of the court, and was, therefore, not present.<sup>154</sup> The plaintiff can not be heard to complain of surprise at the requirement of evidence

<sup>143</sup> *Schellhous v. Ball*, 29 Cal. 608; *Ames v. Howard*, 1 Sumn. 482; *Carr v. Gale*, 1 Curt. C. C. 384; *Barderre v. Den*, 106 Cal. 594; *Bailey v. Richardson*, 66 id. 416; *Fincher v. Malcolmson*, 96 id. 38.

<sup>144</sup> *Alger v. Merritt*, 16 Iowa, 121.

<sup>145</sup> *Turner v. Morrison*, 11 Cal. 21; *Stout v. Calver*, 6 Mo. 254; 35 Am. Dec. 438; *Jackson v. Roe*, 9 Johns. 77.

<sup>146</sup> *Stewart v. Small*, 5 Mo. 525.

<sup>147</sup> *Live Yankee Co. v. Oregon Co.*, 7 Cal. 42; *Taylor v. California Stage Co.*, 6 id. 228; *Shepard v. Oltizens' Ins. Co.*, 8 Mo. 272; *Beach v. Tooker*, 10 How. Pr. 297.

<sup>148</sup> *Martin v. Clark*, Hempst. 259.

<sup>149</sup> *Mayfield v. State*, 44 Tex. 59.

<sup>150</sup> *Cox v. Hutchings*, 21 Ind. 219; *Peck v. Hensley*, id. 344.

<sup>151</sup> *Klockenbaum v. Pierson*, 22 Cal. 160.

<sup>152</sup> *Armstrong v. Davis*, 41 Cal. 494.

<sup>153</sup> *Fuller v. Hutchings*, 10 Cal. 523; 70 Am. Dec. 746.

<sup>154</sup> *Steigers v. Darby*, 8 Mo. 679.

on his part clearly called for by the issues; even though he was led by the defendant (without fraud) to suppose that the fact in issue would be admitted.<sup>155</sup> A party can not have a new trial on this ground, to enable him to rebut testimony, which he was aware before the former trial might be introduced.<sup>156</sup> Nor that the party was surprised in a matter of law.<sup>157</sup> Nor that a party had given the suit no further attention, having instructed his attorney to accept compromise.<sup>158</sup> Nor that the party was mistaken as to the nature of his case.<sup>159</sup> Nor the unexpected close of plaintiff's case.<sup>160</sup> If a mistake of law can ever be made the means of obtaining a new trial on the ground of surprise, it certainly can not when it is caused by the negligence of such party.<sup>161</sup> A new trial will not be granted on the ground of surprise caused by the rejection of evidence, when such evidence would not, in the judgment of the court, have varied the result.<sup>162</sup> The introduction of false evidence relating solely to a point not necessarily involved in the decision of the action is no ground for a new trial.<sup>163</sup> Surprise at the admission of a witness, because his attorney had advised him that the witness was incompetent, is no ground for a new trial.<sup>164</sup> The mistake of counsel as to competency of a witness is no ground for a new trial.<sup>165</sup> Nor as to what witnesses would testify.<sup>166</sup> Mere surprise at the result of a trial is no ground for a new trial.<sup>167</sup>

§ 4883. **What must be shown.** The cases establish that the party must prove the surprise, how he was injured by it, and that

<sup>155</sup> *Taylor v. Harlow*, 11 How. Pr. 285.

<sup>156</sup> *Meakim v. Anderson*, 11 Barb. 215; *Blake v. Madigan*, 65 Me. 522; *Knapp v. Fisher*, 49 Vt. 94.

<sup>157</sup> *Hite v. Lenhart*, 7 Mo. 22; § 4878, *ante*.

<sup>158</sup> *Patchin v. Wegman*, 19 Mo. 151.

<sup>159</sup> *Robbins v. Alton Ins. Co.*, 12 Mo. 380.

<sup>160</sup> *Wells v. Sanger*, 21 Mo. 354.

<sup>161</sup> *People v. O'Brien*, 4 Park. Cr. 203.

<sup>162</sup> *Foote v. Silsby*, 1 Blatchf. 445.

<sup>163</sup> *Guy v. Hanly*, 21 Cal. 397.

<sup>164</sup> *Klockenbaum v. Pierson*, 22 Cal. 160.

<sup>165</sup> *Packer v. Heaton*, 9 Cal. 568.

<sup>166</sup> *Robbins v. Alton Ins. Co.*, 12 Mo. 380.

<sup>167</sup> *Lane v. Brown*, 22 Ind. 239. Reliance upon the word of a reputable attorney may be excusable neglect, for which relief may be granted on the ground of surprise. *Robertson v. Williams*, 31 Cal. 268; and see *Symons v. Bunnell*, 80 id. 330; compare *McGuire v. Drew*, 83 id. 225; *Mitchell v. Downing*, 23 Oreg. 448.



no laches are justly attributed to him;<sup>168</sup> that the surprise has not resulted from the fault or negligence of the moving party;<sup>169</sup> and that the verdict is mainly attributable to the facts out of which the surprise resulted;<sup>170</sup> and that he has a valid defense, and that on new trial the result may be different.<sup>171</sup>

§ 4884. Affidavit on motion — ground of newly-discovered evidence.

*Form No. 1153.*

[TITLE.]

[VENUE.]

C. D., being duly sworn, deposes and says as follows:

I. I am the defendant in the above-entitled action.

II. Subsequent to the trial of said cause, to-wit, on the ..... day of ....., 18..., I have discovered evidence which will establish the fact [state a fact material to the issue]; that said evidence is new, material to the issue, and not cumulative, nor will it be brought to impeach any evidence or the testimony of any witness who has been heretofore examined in the said action.

III. I did not know of the existence of said evidence at the time of the trial, and could not by the use of reasonable diligence [or the utmost diligence] have discovered and produced the same upon the former trial.

[JURAT.]

[SIGNATURE.]

§ 4885. Affidavit. Newly-discovered evidence relied on to obtain a new trial has no place in a statement. It should be presented in affidavits.<sup>172</sup> Motions for new trial, on the ground

<sup>168</sup> Brooks v. Douglass, 32 Cal. 208; Patterson v. Ely, 19 id. 28; Stephens v. Chiles, 1 A. K. Marsh. 334; Blythe v. Sutherland, 3 McCord, 258; Libenintz's Adm'r v. Greenland, 2 id. 313; Smith v. Morrison, 3 A. K. Marsh. 81; McFarland's Adm'r v. Clark, 9 Dana, 134.

<sup>169</sup> Rogers v. Huie, 1 Cal. 429; 54 Am. Dec. 300; Schellhous v. Ball, 29 Cal. 605; Whetmore v. Murdock, 3 Woodb. & M. 380; Henckley v. Hendrickson, 5 McLean, 170; Snowhill v. Knapp, 7 N. Y. Leg. Obs. 15.

<sup>170</sup> Schellhous v. Ball, 29 Cal. 605; People v. Mack, 2 Park. Cr. 673; De Leyer v. Michaels, 5 Abb. Pr. 203; Hartwright v. Badham, 11 Price, 383.

<sup>171</sup> Cook v. De la Guerra, 24 Cal. 237; McClusky v. Gerhauser, 2 Nev. 47.

<sup>172</sup> Beans v. Emanuelli, 36 Cal. 117. An application for a new trial, on the ground of newly-discovered evidence, is addressed to the



of newly-discovered evidence, must be regarded with suspicion and disfavor. In such cases the motion must be supported by the affidavit of the moving party that he did not know the newly-discovered evidence;<sup>173</sup> and usually by the affidavits of the newly-discovered witnesses, showing what they know and will testify;<sup>174</sup> and should be free from the suspicion of bad faith.<sup>175</sup> The affidavit of the party can not be received in lieu of the affidavits of such witnesses, unless for good cause shown it appears that the affidavits of the latter can not be obtained in time, or in such further time as may have been granted for that purpose.<sup>176</sup> Witness's affidavit must be produced, or proof that it can not be obtained;<sup>177</sup> or a sufficient excuse be furnished for its absence;<sup>178</sup> or time be obtained for its production.<sup>179</sup> The best possible proof must be adduced of the existence of the newly-discovered evidence.<sup>180</sup> If the affidavit states that the new witness merely "told" the party the facts relied on, it is insufficient.<sup>181</sup>

§ 4886. **Diligence must be shown.** To justify a new trial on this ground, it must be shown that the party moving used rea-

discretion of the trial court, and its action will not be disturbed except for abuse of discretion. *Longley v. Daly*, 1 S. Dak. 257; *People v. Urquidas*, 96 Cal. 239; *Childs v. Lauterman*, 95 id. 369; and see § 4884, *ante*.

<sup>173</sup> *Baker v. Joseph*, 16 Cal. 180; *Arnold v. Skaggs*, 35 id. 684.

<sup>174</sup> *Hare v. Sproul*, 2 How. (Miss.) 772.

<sup>175</sup> *Merk v. Gelzhaeuser*, 50 Cal. 631.

<sup>176</sup> *Arnold v. Skaggs*, 35 Cal. 684.

<sup>177</sup> *Rogers v. Hule*, 1 Cal. 433; *Jenny Lind Co. v. Bower*, 11 id. 194; *Case v. Coddington*, 38 id. 194; *Den v. Morrell*, 1 Hall. 382; *Smith v. Cushing*, 18 Wis. 295.

<sup>178</sup> *Smith v. Cushing*, 18 Wis. 295.

<sup>179</sup> *Jenny Lind Co. v. Bower*, 11 Cal. 194.

<sup>180</sup> *Smith v. Cushing*, 18 Wis. 295.

<sup>181</sup> *Shumway v. Fowler*, 4 Johns. 425. See, also, as to the requisites and sufficiency of the affidavit. *Gaines v. White*, 1 S. Dak. 434; *People v. Urquidas*, 96 Cal. 239; *Bate v. Miller*, 63 id. 233; *Kern Valley Bank v. Chester*, 55 id. 49; *Ross v. Sedgwick*, 69 id. 247; *People v. Wong Ah Foo*, id. 180; *Braithwaite v. Aiken*, 2 N. Dak. 57; *Goose River Bank v. Gilmore*, 3 id. 188; *People v. McCurdy*, 68 Cal. 576; *Thompson v. Thompson*, 88 id. 110; *Madden v. Steamship Co.*, 86 id. 445. Identification of affidavits. See *People v. Fredericks*, 106 Cal. 554. Affidavit of counsel based upon information and belief, of what a witness will testify is insufficient to secure a new trial on the ground of newly-discovered evidence. *Cole v. Thornburg*, 4 Col. App. 95.

sonable diligence to discover and produce the evidence on a former trial, and that his failure to do so was not the result of his own laches;<sup>182</sup> that the strictest diligence is required, and that the evidence will change the result, where the evidence is merely cumulative.<sup>183</sup> And the application should state what diligence was used;<sup>184</sup> absence from state being no excuse for want of diligence.<sup>185</sup> Diligence or the want of it in a particular case depends in a great degree upon the circumstances surrounding the parties and the conduct of the cause, which are peculiarly within the knowledge of the trial court, and its action will rarely be interfered with on appeal.<sup>186</sup> A new trial will not be granted when the discovered evidence is alleged to be a deed recorded in the county recorder's office a year before the trial, and a record of a judgment in the same court in which the cause was tried.<sup>187</sup> If materiality is discovered during trial, continuance should be asked for, or new trial will be refused.<sup>188</sup>

<sup>182</sup> *Butler v. Vassault*, 40 Cal. 74; *Arnold v. Skaggs*, 35 id. 684; *Baker v. Joseph*, 16 id. 173; *Howard v. Winters*, 3 Nev. 539; *Williams v. Baldwin*, 18 Johns. 489; *Vandervoort v. Smith*, 2 Cal. 155; *Palmer v. Mulligan*, 3 id. 307; *Jackson v. Malin*, 15 Johns. 293; *People v. Mack*, 2 Park. Cr. 673; *People v. New York Superior Court*, 10 Wend. 285; *Macy v. De Wolf*, 3 Woodb. & M. 193; *Aiken v. Bemis*, id. 384; *Whetmore v. Murdock*, id. 380; *People v. Superior Court*, 5 Wend. 115; *Leavy v. Roberts*, 8 Abb. Pr. 310; S. C., 2 Hilt. 285; *Fellows v. Emperor*, 13 Barb. 92; *People v. Marks*, 10 How. Pr. 261; *De Lima v. Glassell*, 4 Hen. & M. 369; *Floyd v. Jayne*, 6 Johns. Ch. 479; *Campbell v. Genet*, 2 Hilt. 290; *Washburn v. Gould*, 3 Story C. C. 122; *Palmer v. Flisk*, 2 Curt. C. C. 14; *Prevost v. Gratz*, Pet. C. C. 364; *Garrison v. United States*, 2 Ct. of Cl. (Nott & H.) 382; *Flkes v. Bentley*, Hempst. 61; *Dickson v. Mathers*, id. 65; *Coote v. Bank of United States*, 3 Cranch C. C. 95; *Leschi v. Ter. of Wash.*, Wash. Ter. 23; *Nininger v. Knox*, 8 Minn. 140; *Arthur v. Chavis*, 6 Rand. 142; *Doubleday v. Makepeace*, 4 Blackf. 9; *Carson v. Cross*, 14 Iowa, 463.

<sup>183</sup> *Levitsky v. Johnson*, 35 Cal. 41.

<sup>184</sup> *Burnley v. Rice*, 21 Tex. 171; *Edmiston v. Garrison*, 18 Wis. 594.

<sup>185</sup> Id. There must be a satisfactory showing of reasonable diligence. *Von Glohn v. Brennan*, 81 Cal. 261; *Harralson v. Barrett*, 99 id. 607; *Moran v. Abbey*, 63 id. 56; *Nesbit v. People*, 19 Col. 441; *Gaines v. White*, 2 S. Dak. 410; *Barton v. Laws*, 4 Col. App. 212.

<sup>186</sup> *Jones v. Singleton*, 45 Cal. 94; see, also, *Brown v. Luehrs* 79 Ill. 575; *Kenezleber v. Wahl*, 92 Cal. 202; *Heintz v. Cooper*, 104 id. 668.

<sup>187</sup> *Weimer v. Lowery*, 11 Cal. 104; *Vardeman v. Edwards*, 21 Tex. 737.

<sup>188</sup> *Berry v. Metzler*, 7 Cal. 418; *Klockenbaum v. Pierson*, 22 id. 160. If new evidence was within reach of the moving party before

But where a witness on the former trial did not disclose all the knowledge he had relative to the facts, it is not ground for a new trial.<sup>189</sup>

§ 4887. **Evidence must not be cumulative.** It must be shown that it is new material, and not cumulative.<sup>190</sup> If merely cumulative, it is no ground for a new trial.<sup>191</sup> There is no presumption that newly-discovered evidence is cumulative; and if it does not appear to be so in the moving papers, the fact must be shown by the party opposing the motion, or he can not complain.<sup>192</sup> Newly-discovered cumulative evidence furnishes no

the trial his ignorance of its materiality can not excuse his lack of diligence in securing and presenting it, and it can not be made the basis of a new trial. *People v. Freeman*, 92 Cal. 359. Counter-affidavits may be used to show that due diligence has not been used. *People v. Cesena*, 90 Cal. 381; *Mowry v. Raabe*, 89 id. 606.

<sup>189</sup> *Davis v. Presler*, 5 Smed. & M. 459; *Phillips v. Ocmulgee Mills*, 55 Ga. 633.

<sup>190</sup> *Bartlett v. Hogden*, 3 Cal. 55; *Reed v. Clark*, 47 id. 194; *Live Yankee Co. v. Oregon Co.*, 7 id. 42; *Taylor v. California Stage Co.*, 6 id. 228; *Gaven v. Dopman*, 5 id. 342; *Klockenbaum v. Pierson*, 22 id. 160; *Spencer v. Doane*, 23 id. 418; *Aldrich v. Palmer*, 24 id. 513; *Outler v. Steamer Columbia*, 1 Oreg. 101; *Howard v. Winters*, 3 Nev. 539.

<sup>191</sup> See above authorities; also, *Cole v. Thornburg*, 4 Col. App. 95; *Levitsky v. Johnson*, 35 Cal. 41; *Stoakes v. Monroe*, 36 id. 383; *Cox v. Hutchings*, 21 Ind. 219; *Sturgeon v. Ferron*, 14 Iowa, 160; *Wilhelmi v. Thorington*, id. 537; *Fleming v. Hollenback*, 7 Barb. 271; *People v. New York Superior Court*, 10 Wend. 285; *Pike v. Evans*, 15 Johns. 210; *Steinbach v. Columbia Ins. Co.*, 2 Cal. 129; *Edmiston v. Garrison*, 18 Wis. 594; *State v. Stumbo*, 26 Mo. 306; *State v. Wightman*, 27 id. 121; *Whitbeck v. Whitbeck*, 9 Cow. 266; *Brisbane v. Adams*, 1 Sandf. 195; *Burnett v. Phalon*, 4 Bosw. 622; *Leavy v. Roberts*, 2 Hilt. 285; *Aiken v. Bemis*, 3 Woodb. & M. 348; *Wheelwright v. Beers*, 2 Hall, 391; *Nason v. Cockroft*, 3 Duer, 366; *Peck v. Hiller*, 30 Barb. 655; *Adams v. Bush*, 23 How. Pr. 262; *Macy v. De Wolf*, 3 Woodb. & M. 193; *Ames v. Howard*, 1 Sumn. 482; *Long v. Bank*, 8 Utah, 104; *Mining Co. v. Hammer*, 6 Mont. 54; *People v. Peacock*, 5 Utah, 237; *Link v. Railway Co.*, 3 Wyo. 680; *Reed v. Drals*, 67 Cal. 491; *Williamson v. Tobey*, 86 id. 497; *McCormick v. Railroad Co.*, 75 id. 508; *Von Glahn v. Brennan*, 81 id. 261.

<sup>192</sup> *Hobler v. Cole*, 49 Cal. 250. Where the question as to whether newly-discovered evidence upon which a new trial is asked is cumulative is involved in doubt, an order granting a new trial therefor will not be disturbed upon appeal, where there has been no manifest abuse of discretion by the trial court. *Kenezleber v. Wahl*, 92 Cal. 202. But where every material fact of the alleged newly-discovered evidence is contradicted by counter-affidavits, the

ground for a new trial, unless it is of so controlling a character that it would probably change the verdict.<sup>193</sup> The best definition of the term "cumulative evidence" is that in *Parker v. Hardy*, 24 Pick. 246, viz.: "Cumulative evidence is additional evidence of the same kind to the same point."<sup>194</sup> That only is cumulative which is in addition to or corroborative of what has been given at the trial.<sup>195</sup> Evidence is cumulative if it supports evidence introduced on the trial to prove facts of secondary importance, the tendency of which was to prove the facts in issue.<sup>196</sup> But if it would bring to light some new fact bearing upon the main issue, it is not cumulative.<sup>197</sup> Evidence upon some fact which is specifically distinct, and bears upon the issue, is not cumulative, though it may be intimately connected with parts of the other testimony.<sup>198</sup> So proof that plaintiff had acknowledged settlement of the demand should not be deemed cumulative.<sup>199</sup> Nor in case of crim. con., proof that plaintiff had for some time been living in adultery.<sup>200</sup>

§ 4888. **Must not be impeaching.** It must be shown that it is not to impeach an adverse witness. It must go to the merits of the case, and not be such as tends merely to discredit a witness;<sup>201</sup> except in very rare cases, such as where the whole

discretion of the court in refusing a new trial will not be interfered with. *People v. Mesa*, 93 Cal. 580; and see *Mowry v. Raabe*, 89 id. 606.

<sup>193</sup> *Windham County Bank v. Kendall*, 7 R. I. 77; *State v. O'Brien*, id. 336; *Heaton v. Manhattan Ins. Co.*, id. 502; *O'Rourke v. Vennekohl*, 104 Cal. 254.

<sup>194</sup> *Bradish v. State*, 35 Vt. 452.

<sup>195</sup> *Gray v. Harrison*, 1 Nev. 502.

<sup>196</sup> *Stoakes v. Monroe*, 36 Cal. 383; *Gray v. Harrison*, 1 Nev. 502.

<sup>197</sup> *Gray v. Harrison*, 1 Nev. 502.

<sup>198</sup> *Alger v. Merritt*, 16 Iowa, 121; *Stineman v. Beath*, 36 id. 73; *German v. Maquoketa Savings Bank*, 38 id. 368; *Wilson v. Plank*, 41 Wis. 94.

<sup>199</sup> *Guyott v. Butts*, 4 Wend. 579.

<sup>200</sup> *Smith v. Masten*, 15 Wend. 270.

<sup>201</sup> *Baker v. Joseph*, 16 Cal. 180; *People v. Anthony*, 56 id. 397; *People v. McCurdy*, 68 id. 576; *Fist v. Fist*, 3 Col. App. 273; *Klockenbaum v. Pierson*, 22 Cal. 160; *Deer v. State*, 14 Mo. 348; *Meakin v. Anderson*, 11 Barb. 215; *Beach v. Tooker*, 10 How. Pr. 297; *Simmons v. Fay*, 1 E. D. Smith, 107; *Carr v. Gale*, 1 Curt. C. C. 384; *United States v. Potter*, 6 McLean, 182; *Brooke v. Payton*, 1 Cranch C. C. 128; *Ter. of Oregon v. Latshaw*, 1 Oreg. 146; *Barrett v. Belshe*, 4 Bibb, 348; *Harrington v. Bigelow*, 2 Den. 109; *Fleming v. Hollenback*, 7 Barb. 271; *Shumway v. Fowler*, 4 Johns. 425.

question is one of identity of persons long deceased. To give an opportunity of impeaching the character of a principal witness,<sup>202</sup> or where in a criminal case the affidavit of the principal witness stated that her evidence given on the trial was incorrect, and her mother stated in an affidavit that she was unreliable;<sup>203</sup> new evidence on points formerly in issue must be of preponderating character, and decisive on the evidence to be overturned.<sup>204</sup> But where the genuineness of a signature is put in issue and made the subject of proof, a new trial will not be granted on account of the discovery of new evidence tending to prove the signature a forgery.<sup>205</sup> Where the plaintiff in ejectment recovers on a paper title and defendant discovers after the trial that plaintiff had conveyed his title to a third person before the commencement of the suit, a new trial should be granted.<sup>206</sup> But where the defense was forgery in an action on a note, a new trial was granted on the ground that the note, which at the time of the trial was lost, had since been found.<sup>207</sup> Admissions and conversations of a defendant, the purport of which is in direct conflict with his testimony in the case, and with the theory of his defense, are not impeaching but original evidence.<sup>208</sup>

**§ 4889. Must be material.** It must be shown that it is material to the issue; and of so important a character as to satisfy the court that it may reasonably be inferred the verdict would have been different if it had been in on the former trial;<sup>209</sup> or that it would materially vary the complexion of the cause.<sup>210</sup> Where a referee, after report had been made up, refused, from doubt as to his powers, to allow the introduction of newly-discovered evidence, at the same time intimating in a supplemental

<sup>202</sup> Jackson v. Kinney, 14 Johns. 186; Jackson v. Hooker, 5 Cow. 207.

<sup>203</sup> Mann v. State, 44 Tex. 642.

<sup>204</sup> Finley v. Tyler, 3 Mont. 400.

<sup>205</sup> Wright v. Carillo, 22 Cal. 595.

<sup>206</sup> Cranmer v. Porter, 41 Cal. 462.

<sup>207</sup> Platt v. Munroe, 34 Barb. 291.

<sup>208</sup> Alger v. Merritt, 16 Iowa, 121.

<sup>209</sup> Stokes v. Monroe, 36 Cal. 383; State v. Locke, 26 Mo. 603; Varde-man v. Edwards, 21 Tex. 737; Gaffney v. Hoyt, 2 Idaho, 184; Francisco v. Benepe, 6 Mont. 243; Baumgarten v. Hoffman, 9 Utah, 338; Wimmer v. Simon, id. 378; Turner v. Stevens, 8 id. 75; and see Madden v. Steamship Co., 86 Cal. 445.

<sup>210</sup> Levitsky v. Johnson, 35 Cal. 41; United States v. Cornell, 2 Mason, 91; Ludlow v. Parker, 4 Ham. 5.

report that if such evidence had been adduced on the trial, the result would probably have been different, it was held to be good ground for a new trial.<sup>211</sup>

§ 4890. **Must be subsequently discovered.** The moving party must show by his own affidavit that the new evidence was not known to him at the time of the trial. Upon that question the affidavits of other persons are not sufficient.<sup>212</sup> A new trial for this cause is never granted if the existence of the new evidence was known to the applicant before the trial was had;<sup>213</sup> even though he had forgotten it at the time of the trial,<sup>214</sup> and though it was unknown to his counsel until after the trial.<sup>215</sup> Newly-discovered testimony, consisting of facts within the knowledge of witnesses called by the movant and examined on the trial, will not authorize a new trial.<sup>216</sup>

§ 4891. **When new trial denied.** New trial will not be granted if the witnesses whose testimony is sought to be introduced are unworthy of belief;<sup>217</sup> nor if it is improbable that they could be obtained at the new trial.<sup>218</sup> In contesting a motion for a new trial on the ground of newly-discovered evidence, it is competent for the adverse party to show by affidavit that the witness whose testimony is stated is wholly unworthy of credit.<sup>219</sup> Where the affidavit on which the application is made

<sup>211</sup> *Hoyt v. Saunders*, 4 Cal. 345. To warrant a new trial on the ground of newly-discovered evidence it must appear, among other things, that the new evidence be not cumulative merely; that it be such as to render a different verdict reasonably probable upon a retrial; and that it could not, with reasonable diligence, have been discovered and produced at the trial. 1 Hayne, N. Trial and App., § 88; approved, *People v. Demasters*, 109 Cal. 607.

<sup>212</sup> *Arnold v. Skaggs*, 34 Cal. 684.

<sup>213</sup> *Jackson v. Main*, 15 Johns. 293; *Vandervoort v. Smith*, 2 Cal. 155; *Macy v. De Wolf*, 3 Woodb. & M. 193; *Whetmore v. Murdock*, *id.* 380.

<sup>214</sup> *Fleming v. Hollenback*, 7 Barb. 271; *People v. Superior Court*, 10 Wend. 285.

<sup>215</sup> *Young v. State*, 56 Ga. 403; and see § 4885, *ante*.

<sup>216</sup> *Phillips v. Ocmulgee Mills*, 55 Ga. 633; *Archer v. Heldt*, *id.* 200; *Gautier v. Douglass Manufacturing Co.*, 52 How. Pr. 325.

<sup>217</sup> *Cole v. Cole*, 50 How. Pr. 59; *Fleming v. Hollenback*, 7 Barb. 271; *Macy v. De Wolf*, 3 Woodb. & M. 193; *Williams v. Baldwin*, 18 Johns. 489; see *Pomeroy v. Columbian Ins. Co.*, 2 Cal. 260.

<sup>218</sup> *Kendrick v. Delafield*, 2 Cal. 67.

<sup>219</sup> *Williams v. Baldwin*, 18 Johns. 489.

is shown by counter-affidavits to be open to the suspicion of bad faith, and it also fails to raise a reasonable presumption that the new evidence, if produced, would change the result, a new trial will be denied.<sup>220</sup> On a conviction for larceny a new trial will not be granted to allow the prisoner to introduce evidence that the stolen property did not belong to the person named in the indictment.<sup>221</sup>

§ 4892. **Motion on statement, etc.** When the application for a new trial is made for any other cause than those named in the first four subdivisions of the notice, that is, when it is made on the ground of excessive damages, insufficiency of the evidence to justify the verdict, etc., or for error in law occurring at the trial and excepted to by the party making the application, it may be made at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case.<sup>222</sup> In such cases probably the more frequent practice is to move on the statement of the case; though in some instances a bill of exceptions takes its place.

§ 4893. **Bill of exceptions.** If the motion is to be made upon a bill of exceptions, and no bill has already been settled as hereinbefore provided,<sup>223</sup> the moving party shall have the same time after service of the notice to prepare and obtain a settlement of a bill of exceptions as provided after the entry of judgment, or after receiving notice of such entry, and a bill shall be prepared and settled in like manner. If a bill of exceptions has been already settled and filed, when the notice of motion is given, such bill shall be used on the motion.<sup>224</sup> A bill of ex-

<sup>220</sup> *Merk v. Gelzhauser*, 50 Cal. 631; see, also, *Cole v. Cole*, 50 How. Pr. 59. Use of counter-affidavits, see § 4862, *ante*. To obtain a new trial in equity, on the ground of newly-discovered evidence, the complaint must show that the evidence was not discovered in time to have been used in the legal proceeding. If discovered in time to have been presented upon a motion for a new trial in the legal action, relief will be denied in equity. *Snider v. Rinehart*, 20 Col. 448; *Ferrell v. Allen*, 5 W. Va. 43. That newly-discovered evidence as a ground of new trial is not regarded with favor, see *Harralson v. Barrett*, 99 Cal. 607; *Spottiswood v. Weir*, 80 id. 448.

<sup>221</sup> *Foster v. State*, 52 Miss. 695.

<sup>222</sup> Cal. Code Civ. Pro., § 658; *Pavement Co. v. Bowle*, 104 Cal. 286; *Symons v. Bunnel*, 101 id. 223.

<sup>223</sup> See *ante*, "Exceptions."

<sup>224</sup> Cal. Code Civ. Pro., § 659, subd. 2. A statement on motion for a new trial and a bill of exceptions may be incorporated in one



ceptions on a motion for a new trial on the ground of insufficiency of the evidence should specify the particulars wherein it is insufficient.<sup>225</sup>

§ 4894. *Minutes of the court.* When the motion is to be made upon the minutes of the court, and the ground of the motion is the insufficiency of the evidence to justify the verdict or other decision, the notice of motion must specify the particulars in which the evidence is alleged to be insufficient; and if the ground of the motion be errors in law occurring at the trial and excepted to by the moving party, the notice must specify the particular errors upon which the party will rely. If the notice do not contain such specifications, when the motion is made on the minutes of the court, it must be denied.<sup>226</sup> As a statement has to be subsequently prepared in such cases in order to appeal from the order of the court,<sup>227</sup> the practice of moving on the minutes of the court is not common, but the statement is prepared for the hearing of the motion for a new trial; and the statement is then used on the appeal.

§ 4895. *Statement, preparation of.* If the motion is to be made upon a statement of the case, the moving party must, within ten days after the service of the notice or such further time as the court in which the action is pending, or a judge thereof, may allow, prepare a draft of the statement, and serve the same or a copy thereof upon the adverse party. If such

paper without invalidating either. *Spottiswood v. Weir*, 66 Cal. 525. A statement of facts on the hearing of a motion for a new trial is not necessary under Washington practice. *Littlejohn v. Miller*, 5 Wash. St. 399.

<sup>225</sup> *Martin v. Matfield*, 49 Cal. 45; Cal. Code Civ. Pro., § 648; see *ante*, "Exceptions," as to manner of taking and settling bill.

<sup>226</sup> Cal. Code Civ. Pro., § 659, subd. 4; and see *Weyl v. Railroad Co.*, 69 Cal. 202; *Buckley v. Althorf*, 86 id. 643; *Neale v. Railway Co.*, 94 id. 425. The fact that a cause has been tried without the presence of an official reporter, and that no notes of the evidence or proceedings at the trial were ever filed or reduced to writing, does not deprive the losing party of the right to move for a new trial on the minutes of the court, but he may rely upon the recollection of the judge as to the evidence and proceedings, and can thereafter secure a statement of the case. *Malcolmson v. Harris*, 90 Cal. 262. The order denying a motion for a new trial made on the minutes of the court can only be reviewed by embodying such minutes in the statement of the case. *Perego v. Dodge*, 9 Utah, 3.

<sup>227</sup> See Cal. Code Civ. Pro., § 661.



proposed statement be not agreed to by the adverse party, he must, within ten days thereafter, prepare amendments thereto, and serve the same or a copy thereof upon the moving party.<sup>228</sup> The evidence should be presented in a narrative form, or by statement of its substance, or what it tended to prove.<sup>229</sup> The office of a statement on motion for new trial is to bring into the record those matters only which arise in the progress of the trial, and constitute the basis of the motion under the fifth, sixth, and seventh subdivisions of section 193 of the Practice Act,<sup>230</sup> and which the appellant desires to have reviewed on appeal from the order granting or refusing a new trial.<sup>231</sup> Matters which do not seem to illustrate the point, such as verifications, acknowledgment of deeds, and titles of courts, should be omitted,<sup>232</sup> substituting the words "duly verified," "duly acknowledged," "title of cause," etc.<sup>233</sup> But a skeleton statement containing the words "[here insert deed, etc.]," describing it, without consent of parties, will be stricken from the transcript,<sup>234</sup> and the court will not consider the questions which it

<sup>228</sup> Cal. Code Civ. Pro., § 659, subd. 3; *Chase v. Evoy*, 58 Cal. 348. Time within which to make and serve statement. See *Cooney v. Furlong*, 66 Cal. 520; *Cole v. Wilcox*, 99 id. 549. Extension of time therefor. *Curtis v. Superior Court*, 70 id. 390; *Bunnel v. Stockton*, 83 id. 319; *Muir v. Galloway*, 61 id. 498; *Matthews v. Superior Court*, 68 id. 638; relief from excusable neglect or mistake. *Cole v. Wilcox*, 99 id. 549. An order extending the time within which to prepare a statement on motion for a new trial carries with it the same extension of time to serve the statement. *Bryant v. Sternfeld*, 89 Cal. 611. Proof of service of statement. See *Wulf v. Manuel*, 9 Mont. 276. Statement need not be served on all the attorneys of certain of the respondents, when attorneys representing all the respondents were properly served. *Walsh v. Mueller*, 14 Cal. 76. The same rule of law applies to bills of exceptions as to statements on motion for a new trial, in the respect that the party moving must prepare and serve his bill of exceptions within the time allowed by law for that purpose, or it can not be settled, or if settled, can not be considered, either at the hearing of the motion or on appeal. *Stonesifer v. Armstrong*, 86 Cal. 594.

<sup>229</sup> *People v. Getty*, 49 Cal. 581.

<sup>230</sup> Cal. Code Civ. Pro., § 657.

<sup>231</sup> *Harper v. Minor*, 27 Cal. 109.

<sup>232</sup> *Estate of Boyd*, 25 Cal. 513.

<sup>233</sup> Id.; *Mariner v. Smith*, 27 Cal. 654; *Provost v. Piper*, 9 id. 552.

<sup>234</sup> *Kimball v. Semple*, 31 Cal. 657. But a proposed statement should not be rejected because it contains reference to documentary evidence, with the remark "[here insert]," notifying the opposite party that it is to become part of the statement. Such reference in

is intended to present.<sup>235</sup> Nor will a mandate lie to compel the clerk of the lower court to certify such a statement, or to engross it, inserting the omitted documents in their proper places.<sup>236</sup> It is seldom necessary to insert an entire deed; it is sufficient to say that a deed was introduced from A. to B., showing that A.'s title has vested in B.<sup>237</sup> They may be inserted in the transcript, if they are mentioned in the statement as having been in evidence, with a certificate of the judge that it was before him on motion for a new trial.<sup>238</sup> Transcripts of records and deeds, where no point is made on the construction of the language, may be referred to by a brief statement.<sup>239</sup> Where documentary evidence is referred to, the appellant can not insert copies of the same in the transcript on appeal without the assent of the other party, unless the statement has been engrossed and settled and afterwards authenticated, or unless the originals are on file and form part of the records.<sup>240</sup> Where the admission in evidence of a judgment-roll is relied upon as error, the statement should contain either the record or paper so admitted, or a settled abstract thereof, in order that the court may judge of its admissibility.<sup>241</sup> And if a party relies on the insufficiency of the evidence, and a statement or bill of exceptions is settled, it will be presumed that it contains all the evidence given in the case necessary to explain the points involved, and that no different case would be presented as to such points had all omitted evidence been inserted.<sup>242</sup> The reporter's notes do not constitute a statement, and can not be considered on ap-

an engrossed statement would render it a skeleton statement, but a proposed statement is not to be rejected, or settlement thereof refused on that account. *Reclamation District v. Hamilton*, 112 Cal. 603. Waiver of objection for lack of signature to statement. *Pearce v. Boggs*, 99 Cal. 340.

<sup>235</sup> *Bush v. Taylor*, 45 Cal. 112.

<sup>236</sup> *People v. Bartlett*, 40 Cal. 142.

<sup>237</sup> *Kimball v. Semple*, 31 Cal. 657; *Alblon Min. Co. v. Mining Co.*, 19 Nev. 225.

<sup>238</sup> *Hess v. Winder*, 30 Cal. 349.

<sup>239</sup> *Knowles v. Inches*, 12 Cal. 212.

<sup>240</sup> *Kimball v. Semple*, 31 Cal. 657.

<sup>241</sup> *Doyle v. Franklin*, 48 Cal. 537.

<sup>242</sup> *Abbey Homestead Ass'n v. Willard*, 48 Cal. 615. It is the duty of the party moving for a new trial to present a statement containing the grounds upon which he intends to rely, and so much of the evidence as may be necessary to explain the same, and no more. *Adams v. Lombard*, 80 Cal. 428.

peal.<sup>243</sup> The specification of particulars or errors should be made a part of the proposed statement, for without it neither the adverse party nor the judge can well know how much of the evidence should be set forth.<sup>244</sup>

§ 4896. **Specification of particulars.** When the notice of the motion designates, as the ground of the motion, the insufficiency of the evidence to justify the verdict or other decision, the statement shall specify the particulars in which such evidence is alleged to be insufficient. When the notice designates, as the ground of the motion, errors in law occurring at the trial, and excepted to by the moving party, the statement shall specify the particular errors upon which the party will rely. If no such specifications be made, the statement shall be disregarded on the hearing of the motion.<sup>245</sup> The specifications should be contained in the statement; it is not sufficient that they are upon an annexed, unsigned paper.<sup>246</sup> It constitutes the basis of the statement, and if wanting, the statement should be disregarded.<sup>247</sup> No point will be considered unless it is specified.<sup>248</sup> If a paper purporting to be a statement on motion for a new trial does not contain a specification of the particular grounds relied on, there is no such statement as is required by statute, and nothing on which the court can act.<sup>249</sup>

A specification of the particular grounds of error is the essential element of a statement;<sup>250</sup> and all errors to which objection is made on motion for a new trial should be specified;<sup>251</sup> as that

<sup>243</sup> *People v. Armstrong*, 44 Cal. 327; *Becker v. Commissioners*, etc., 10 Mont. 87; *Barger v. Halford*, id. 57.

<sup>244</sup> *Barrett v. Tewksbury*, 15 Cal. 354.

<sup>245</sup> Cal. Code Civ. Pro., § 659, subd. 3.

<sup>246</sup> *Spencer v. Long*, 39 Cal. 700.

<sup>247</sup> Id.; *Elder v. Shaw*, 12 Nev. 78.

<sup>248</sup> *Hawkins v. Abbott*, 40 Cal. 639.

<sup>249</sup> *Hutton v. Reed*, 25 Cal. 478; *Walls v. Preston*, id. 59.

<sup>250</sup> *Hutton v. Reed*, 25 Cal. 483; *Partridge v. San Francisco*, 27 id. 415.

<sup>251</sup> *Crowther v. Rowlandson*, 27 Cal. 376; *Burnett v. Pacheco*, id. 408. See, also, as to necessity of specification of errors in statement, *Bohnert v. Bohnert*, 95 Cal. 444; *Nye v. Railroad Co.*, 97 id. 461; *Parls v. Raynor*, 76 id. 647; *Donohoe v. Mining Co.*, 66 id. 317; *Graham v. Stewart*, 68 id. 374; *Earles v. Gilham*, 20 Nev. 46, 49; *Demers v. McCormick*, 5 Mont. 234; *Dawson v. Baum*, 3 Wash. Ter. 464; *Gilberson v. Smelting Co.*, 4 Utah, 46; *Slater v. Railway Co.*, 8 id. 178; *Williams v. Dennison*, 94 Cal. 540; *Hershay v. Kness*, 75 id. 115; *Fleming v. Albeck*, 67 id. 226. The specification should dis-

the suit is barred by a former adjudication, between the same parties, upon the same subject-matter; that the cause of action is barred by the Statute of Limitations; that the property in question was the separate property of the wife. So an erroneous instruction may be assigned as error, if there be any evidence rendering it pertinent to the issue;<sup>252</sup> and may be stated thus: that the respondents are not parties in interest and entitled to bring the suit, having previously divested themselves of their right of property in question.<sup>253</sup> So as to other errors of law.<sup>254</sup> The error must be specified, if there is but one question of error that could be raised.<sup>255</sup> If, at the close of a statement on motion for new trial, the moving party says that he "will rely, on the argument of the motion for new trial in this cause, upon the following grounds," and then enumerates his grounds, he will be considered as abandoning all the grounds not enu-

tinguish each particular proposition of fact excepted to from all others involved in the findings of the court or in the verdict of the jury. *Dawson v. Schloss*, 93 Cal. 194. A specification which attacks mere conclusions of law is not sufficient. *Anthony v. Jillson*, 83 Cal. 296. A general specification "that the court erred in giving to the jury instructions asked by plaintiff," is insufficient. *Joyce v. White*, 95 Cal. 236. Specifications are not sufficient to entitle the evidence to be reviewed, where they merely state generally what the evidence shows, and do not purport to state the particulars wherein the evidence is insufficient to justify the finding or verdict. *Haight v. Tryon*, 112 Cal. 4; and see *Gregory v. Gregory*, 102 id. 50; *Green v. Green*, 103 id. 108; *Adams v. Helbing*, 107 id. 298; *Kumla v. Grand Lodge, etc.*, 110 id. 204; *Silva v. Holland*, 74 id. 530; *Lowrie v. Selez*, 75 id. 349; *Patent Brick Co. v. Moore*, id. 205; *Spots v. Hanley*, 85 id. 155; *Knott v. Peden*, 84 id. 219; *Cummings v. Ross*, 90 id. 68; *Dawson v. Schloss*, 93 id. 194; compare *Estate of Yoakam*, 103 id. 503; *Smith v. Ellis*, id. 294. Maps, models, and diagrams used to illustrate the evidence of the witnesses, but not put in evidence, need not be embodied in the statement. *Alblon Min. Co. v. Mining Co.*, 19 Nev. 225. It is held when the statement on motion for new trial contains no specification of errors complained of, it is error to grant a new trial, even though the notice of motion does contain a specification of errors. *Sterling v. Parsons*, 9 Utah, 81; *Canal Co. v. Edwards*, id. 477; overruling *Stevens v. Higginbotham*, 6 id. 215; and see *Ferrer v. Insurance Co.*, 47 Cal. 416.

<sup>252</sup> *Barrett v. Tewksbury*, 15 Cal. 359.

<sup>253</sup> *Id.*

<sup>254</sup> *Alegro v. Duncan*, 24 How. Pr. 210; *Pico v. Cohn*, 67 Cal. 258; *Bagnall v. Roach*, 76 id. 106.

<sup>255</sup> *Zenith Gold & Silver Min. Co. v. Irvine*, 32 Cal. 302.

merated.<sup>256</sup> It is not enough that in the history of a case exceptions appear scattered here and there through a statement made on motion for new trial, but it is necessary in the statement to specify the particular errors upon which the party will rely.<sup>257</sup> Specifications of the "particulars in which the court erred" can not be considered as specifications of the particulars wherein the evidence was insufficient. Nor is it an error of law that the evidence is insufficient to justify a particular finding of fact.<sup>258</sup> The statement shall contain so much of the evidence, or reference thereto, as may be necessary to explain the particular points specified;<sup>259</sup> but evidence not bearing on those points should be excluded.<sup>260</sup> It is presumed that the statement on motion for a new trial contains all the evidence pertinent to the motion.<sup>261</sup> In Nevada, however, it has been uniformly held that an order denying a motion for new trial on the ground of insufficiency of evidence was proper, where the motion was made on a statement failing to show expressly that all the evidence was before the court; and where a new trial was granted by the court below on such a defective statement, the order was reversed.<sup>262</sup>

An application on the ground of error in instructions must point out with reasonable certainty and particularity the error complained of.<sup>263</sup> Error in disregarding the evidence offered by defendant to show the title to the lands in dispute to be in him, and in sustaining either or any of the objections made by the plaintiff to the admissibility of said evidence, or any part thereof, is a defective specification, and the form disapproved, but the point was considered under the peculiar circumstances of the case.<sup>264</sup> The findings of the court need not be embodied in the statement or bill of exceptions.<sup>265</sup> But if a new trial is ap-

<sup>256</sup> *Beans v. Emanuelli*, 36 Cal. 117.

<sup>257</sup> *Id.*

<sup>258</sup> *Smith v. Christian*, 47 Cal. 18.

<sup>259</sup> *Hutton v. Reed*, 25 Cal. 483; *McMinn v. Whelan*, 27 *id.* 319.

<sup>260</sup> *Harper v. Minor*, 27 Cal. 107; *Estate of Boyd*, 25 *id.* 513; see § 4895, *ante*.

<sup>261</sup> *Clark v. Gridley*, 35 Cal. 398; *Hidden v. Jordan*, 28 *id.* 301; *Abbey Homestead Ass'n v. Willard*, 48 *id.* 614; *Cereghino v. Cereghino*, 4 Utah, 100.

<sup>262</sup> *Libby v. Dalton*, 9 Nev. 23.

<sup>263</sup> *Estep v. Larsh*, 21 Ind. 183; *Peck v. Hensley*, *id.* 344; *Joyce v. White*, 95 Cal. 236.

<sup>264</sup> *Sharp v. Lumley*, 34 Cal. 611.

<sup>265</sup> *Reynolds v. Harris*, 8 Cal. 618.

plied for on the ground that the findings are against the evidence, a specification of the particulars in which each finding is deemed against the evidence is necessary.<sup>266</sup>

§ 4897. **Settlement of statement.** If no amendments are served within the time designated, or if served are allowed, the proposed statement and amendments, if any, may be presented to the judge or referee for settlement without notice to the adverse party. If amendments are proposed and adopted, the statement shall be amended accordingly, and then presented to the judge who tried or heard the cause, for settlement, or delivered to the clerk of the court for the judge.<sup>267</sup> If not adopted, the proposed statement and amendments shall, within ten days thereafter (*i. e.*, after the service of the amendments), be presented by the moving party to the judge, upon five days' notice to the adverse party, or delivered to the clerk of the court for the judge; and thereupon the same proceedings for the settlement of the statement shall be taken by the parties, and clerk, and judge, as are required for the settlement of bills of exception.<sup>268</sup> If the action was heard by a referee, the statement shall be settled by him as prescribed in that section.<sup>269</sup>

§ 4898. **Duty of judge on settlement.** It is the duty of the judge, or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement truly represent the case, notwithstanding the assent of the parties to such redundant or useless matter, or to any inaccurate statement.<sup>270</sup> If the motion be made on the minutes of the court and a statement be afterwards prepared, it shall only contain the grounds argued before the court for a new trial, and

<sup>266</sup> *Le Roy v. Rogers*, 30 Cal. 229; 89 Am. Dec. 88.

<sup>267</sup> Cal. Code Civ. Pro., § 659, subd. 3. Where a proposed statement is served on the attorney of the adverse party within the time limited by law, and the proposed amendments thereto are adopted by the moving party, the statement as amended may be presented to the judge or delivered to the clerk for settlement within any reasonable time thereafter. *Pendergrass v. Cross*, 73 Cal. 475; and see *Smith v. City of Stockton*, *Id.* 204. No notice of the refusal of the moving party to adopt proposed amendments is required to be given, other than the delivery of the statement and amendments to the clerk or judge. *Mellor v. Crouch*, 76 Cal. 594.

<sup>268</sup> *Id.*, § 650.

<sup>269</sup> *Id.*, § 659, subd. 3. See *ante*, "Exceptions."

<sup>270</sup> *Id.*, § 659, subd. 3.

so much of the evidence or other matter as may be necessary to explain them; and it shall be the duty of the judge to exclude all other evidence or matter from the statement.<sup>271</sup> When settled the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed.<sup>272</sup> The parties may, by stipulation, waive the signature of the judge or referee.<sup>273</sup> Judges, judicial officers, and the Supreme Court possess, respectively, the same power in settling and certifying statements as is conferred upon them in settling and certifying bills of exceptions in this section.<sup>274</sup> The court below loses jurisdiction to settle and allow a statement on motion for a new trial after appeal taken.<sup>275</sup>

<sup>271</sup> Id., § 681. Affidavits used on the hearing of a motion for a new trial, and not indorsed by the judge or clerk "at the time as having been read or referred to on the hearing" of the motion for new trial, will be stricken from the statement on appeal. *Albion Min. Co. v. Mining Co.*, 19 Nev. 225; *Dean v. Pritchard*, 9 id. 232.

<sup>272</sup> Id., § 659, subd. 3.

<sup>273</sup> *Sarver v. Garcia*, 49 Cal. 218.

<sup>274</sup> Cal. Code Civ. Pro., § 653. See *ante*, "Exceptions."

<sup>275</sup> *Thomas v. Sullivan*, 11 Nev. 280. *Settlement of statement.*—Where a motion for a new trial is to be made on a statement of the case, an order denying the motion before the statement has been settled and certified by the court is erroneous. *Stewart v. Taylor*, 68 Cal. 5. Where the statement does not appear to have been settled by the trial judge, and signed by him, and contains no specification of errors, the granting of a new trial upon such a statement is error. *Slater v. Railway Co.*, 8 Utah, 178. Where the successor of the judge who tried an action hears and denies the motion for a new trial, made upon the records and minutes of the court, the subsequent statement on appeal from the order denying the motion should be settled by the judge who made the order, and not by his predecessor who tried the action. *Cummings v. Conlan*, 66 Cal. 403. A statement which is not signed by the judge, with his certificate to the effect that the same is allowed, will be stricken from the record on motion in the appellate court, and no implied authentication by waiver will be recognized. *Scherrer v. Hale*, 9 Mont. 63. Notice of settlement to the adverse party is not necessary, when no amendments have been filed within the time allowed by law. *Wulf v. Manuel*, 9 Mont. 276; see *Barbaires v. Gregory*, 64 Cal. 230; *Mellor v. Crouch*, 75 id. 594. Time of settlement of statement. See *Wills v. Koug*, 70 Cal. 548. An unexplained delay of seven months in presenting a statement to the trial judge for settlement is fatal. *Connor v. Motor Road Co.*, 101 Cal. 429. Where a motion is made to disregard a statement on the ground that it had not been presented within the time allowed by law, stipulations of counsel, and orders of the court, an order denying such motion determines



§ 4899. **Filing statement.** When settled and certified by the judge or referee, the statement must be filed with the clerk.<sup>276</sup> The practice in Nevada differs from that in California.<sup>277</sup> Under the Nevada statute, it has been held that the objection that the statement was not filed in time could not be raised on appeal unless it had been made on the hearing of the motion below.<sup>278</sup> And an order extending the time to file the statement must either be filed with the papers of the case or entered on the minutes of the court within the time prescribed by statute.<sup>279</sup> Under the former California statute it was held that a stipulation by counsel to the correctness of a statement, and "waiving all informalities in respect to filing and service of the same," made on the day when it should have been filed, did not justify the moving party in neglecting to file the statement for five months afterwards; and that such neglect was a waiver of the right to move for a new trial.<sup>280</sup> And although the objection might be waived by the adverse party, the party urging such waiver must make it affirmatively appear.<sup>281</sup>

nothing against the mover. The objections made by him may be preserved in the statement before settlement, and the presumption is, that if well taken the court below will give him the benefit of them. *Arnold v. San Jose*, 81 Cal. 621. The trial judge may properly refuse to settle a statement if the notice of the motion for a new trial or the proposed statement has not been served in time, and can not be required to settle such statement merely to be used on appeal from the judgment. *Jue Fook Sam v. Lord*, 83 Cal. 159. The action of the trial court in allowing the moving party to insert in the proposed statement a request for its settlement and allowance is not erroneous, although the amendment was made after the time for filing the statement had expired. *Richardson v. Eureka*, 96 Cal. 444. *Mandamus* is a proper remedy to compel a judge to settle a statement on motion for new trial in a case where it is his duty to do so. *Keane v. Murphy*, 19 Nev. 89. But this remedy was refused in a case where the notice of motion for new trial was made too late. *Clark v. Crane*, 57 Cal. 629.

<sup>276</sup> Cal. Code Civ. Pro., § 659, subd. 3.

<sup>277</sup> See Stat. Nev., § 197.

<sup>278</sup> *Twist v. Kelly*, 11 Nev. 377.

<sup>279</sup> *Clark v. Strouse*, 11 Nev. 76; see, also, *Robinson v. Benson*, 19 Nev. 331.

<sup>280</sup> *O'Neil v. Dougherty*, 47 Cal. 164.

<sup>281</sup> *Munch v. Williamson*, 24 Cal. 167. *Filing statement — waiver, etc.* — A statement of the case on motion for a new trial is not required to be filed until it has been signed by the judge with his certificate that it is allowed. When filed, and not before, it becomes a part of the record. *Biazi v. Howes*, 66 Cal. 469. If filed before it is settled,



## § 4900. Statement on motion for new trial.

*Form No. 1154.*

[TITLE.]

This is an action of ejectment for a parcel of land described in the complaint herein [being a portion of a tract of land ..... chains square, called the ..... claim, lying on the north side of the road leading from ..... to .....].

The cause, being regularly called, was tried before the court without a jury, on the ..... day of ....., 18.. The defendant moved for a judgment on the pleadings, which motion was denied, and thereupon the following evidence was introduced:

M. N., called and sworn for plaintiff, testified as follows, etc. [insert testimony in a narrative form, or its substance].

Cross-examined, etc.

O. P., called and sworn for plaintiff, testified as follows, etc. [insert testimony].

Cross-examined, etc.

Book of surveys shown witness, and identified. Plat in said book introduced. Deed [state parties and contents] shown witness; knows the signature. Deed offered in evidence, defendant objected [state grounds of objection]; objection overruled, and deed introduced marked "Exhibit No. 1;" defendant excepted.

It need not be filed afterwards. *Gately v. Irvine*, 51 Cal. 172. If the statement is actually left with the clerk for filing before the motion is submitted, this would be sufficient, whether it is indorsed as filed by the clerk or not; but a certificate or affidavit of the clerk that the statement was not left with him for filing until after the motion had been passed upon, is binding on the appellate court, and will prevail over the affidavit of the appellant to the contrary, unless steps are taken to have the clerk's certificate corrected if false. *Mills v. Dearborn*, 82 Cal. 51. Notice of intention to move for a new trial may be waived by not raising the objection either on the settlement of the statement or on the hearing of the motion. *Cereghino v. Cereghino*, 4 Utah, 100; and see *Sell v. Graves*, 14 Mont. 341. Where the time for filing a statement is extended "to" a certain date, the date named is included within the period prescribed. *Mining Co. v. Schreiner*, 14 Mont. 121. But extension of time for filing statement does not extend the time for filing notice of motion for new trial. *McGrath v. Tallent*, 7 Utah, 256. Extending time for serving statement. See *Elliot v. Whitmore*, 10 Utah, 253.

Cross-examined, etc.

Recalled, examined, says, etc.

Cross-examined, says, etc.

It was here admitted that [state admission]; the plaintiff offered and read in evidence a deed marked "Exhibit No. 2," dated ....., from ..... to ....., for ..... [the land in contest]; defendant objected to the introduction of the deed [state grounds]; objection overruled, and defendant excepted. Also deed marked "Exhibit No. 3," dated ..... from ..... to ....., for ..... acres, including the premises in suit. Also deed marked "Exhibit No. 4," dated ..... from ..... to ....., for ..... acres, including the premises in suit. Which deeds were all admitted and read in evidence against the same objections of the defendant as above named, which were overruled, and to which he excepted.

Plaintiff also offered and read in evidence deposition of ....., on file in this cause, as follows [insert in narrative form]. [State in like manner the evidence introduced on behalf of defendant.]

**SPECIFICATION OF PARTICULARS IN WHICH THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE FINDINGS AND DECISIONS OF THE COURT.**

I. The first finding of the court is unsustainable by the evidence for the reason that [show wherein].

II. That portion of the second finding reading as follows [designate the objectionable portion] is contrary to the evidence in this [show wherein].

III. That portion of the second finding reading as follows [designate other portion] is not sustained by the evidence [show wherein].

**ERRORS OF LAW.**

I. The court erred in denying defendant's motion for judgment on the pleadings.

II. The court erred in admitting in evidence said deed of ..... to ....., dated ....., marked "Exhibit No. 1," there being no seal affixed thereto, and the acknowledgment thereof being defective.

III. The court erred in admitting in evidence said deed of ..... to ....., dated ....., of the

land shown to be the homestead property of ..... and his wife, without the signature and acknowledgment of the wife.

IV. The court erred in refusing to allow defendant to prove that he actually held, possessed, and occupied the demanded premises continuously and adversely, from the ..... day of ....., 18.., to the ..... day of ....., 18.., claiming the same in his own right, adversely to all the world, including .....

**§ 4901. Discretion of court.** Where there is an insufficiency of evidence to sustain the verdict, a new trial may be granted. It rests in the discretion of the court.<sup>282</sup> Where jury renders a verdict against the plain principles of law, as laid down by the court, and against clear and unquestioned evidence, the court will grant a new trial, notwithstanding the particular circumstances or general justice of the case.<sup>283</sup>

**§ 4902. Error in admitting evidence.** From the admission of improper evidence on the trial, pertinent to any material issue, unless the same be withdrawn before the submission of the cause,

<sup>282</sup> *Potter v. Carney*, 8 Cal. 574; *Visher v. Webster*, 13 id. 60; *Lewis v. Covilland*, 21 id. 178; *Oullahan v. Starbuck*, id. 413; *Phelps v. Union C. M. Co.*, 39 id. 467; *Lorenzana v. Camarillo*, 41 id. 467; *Simpson v. Pacific Mut. Life Ins. Co.*, 44 id. 139; *Altschul v. Doyle*, 48 id. 535; *Marble v. Fay*, 49 id. 585; *Doherty v. Enterprise M. Co.*, 50 id. 187; *Warner v. Cleaning Works*, 105 id. 409; *Cole v. Wilcox*, 99 id. 549; *Folton v. Le Breton*, 92 id. 457; *Breckenridge v. Crock*, 68 id. 403; *Pico v. Cohn*, 67 id. 258; *Gerold v. Brunswick Co.*, 67 id. 124; *Bjorman v. Redwood Co.*, 92 id. 500; *Blum v. McHugh*, 92 id. 497; *In re Carringer*, 104 id. 81; *Jones v. Sanders*, 103 id. 678; *Froman v. Patterson*, 10 Mont. 107; *McConley v. Tyler*, 11 id. 51; *Bass v. Buker*, 6 id. 442; *Pratt v. Gilbert*, 8 Utah, 56; *Tousey v. Etzel*, 9 id. 329; *Peterson v. Railway Co.*, 6 Wash. St. 202; *State v. Mackey*, 12 Oreg. 154; *Ounningham v. Railway Co.*, 4 Utah, 206. Sufficient specification of insufficiency of evidence. See *Smith v. Ellis*, 103 Cal. 294; *Dawson v. Schloss*, 93 id. 200; *Harnett v. Railroad Co.*, 78 id. 32; *Brown v. Stark*, 83 id. 636.

<sup>283</sup> *United States v. Duval*, Gilp. 356. Verdict is against law, when. See *Declez v. Save*, 71 Cal. 552; *Sweeney v. Railroad Co.*, 57 id. 15; *Simmons v. Hamilton*, 56 id. 493; *Northern Railway Co. v. Jordan*, 87 id. 23. An error of the trial court in rendering conclusions of law which are not supported by the findings is an error which should be reviewed by a direct appeal from the judgment, and is not a "decision against law" for which a new trial should be granted. *Shanklin v. Hall*, 100 Cal. 26; and see *Boston Tunnel Co. v. McKenzie*, 67 id. 485.

injury is presumed to result to the party against whom such evidence is admitted, and he is entitled to a new trial, whether the cause be submitted to a jury for a general or special verdict, or to the court without the intervention of a jury.<sup>284</sup> Where improper evidence is submitted to the jury under objection, a new trial will be granted, unless it appears that such evidence could have had no influence prejudicial to the party objecting.<sup>285</sup> Injury is presumed from evidence erroneously admitted, except where it clearly appears that no injury accrued,<sup>286</sup> or unless it satisfactorily appears that the verdict would not have been changed.<sup>287</sup> And where the evidence was conflicting, the admission of any incompetent evidence which might possibly prejudice ought not to be overlooked.<sup>288</sup> But where the trial is before a court or referee, a new trial will not lie where there is sufficient competent evidence to justify the judgment.<sup>289</sup> Or where the evidence conflicts with the complaint.<sup>290</sup> Or if there is uncontradicted evidence sufficient to warrant the verdict of the jury.<sup>291</sup> Or if the objection was merely technical.<sup>292</sup> And

<sup>284</sup> *Spanagel v. Dellinger*, 38 Cal. 282; *Rice v. Russell*, 39 id. 609; *Mason v. Wolff*, 40 id. 246; *Leonard v. Kingsley*, 50 id. 628; *Ditch Co. v. Henry*, 15 Mont. 558.

<sup>285</sup> *Innis v. Str. Senator*, 1 Cal. 459; 54 Am. Dec. 305; *Santillon v. Moses*, id. 93; *Trigg v. Conway*, Hempst. 538; *Walpole v. Renfroe*, 16 La. Ann. 92; *Consequa v. Willings*, Pet. C. C. 225; *Brown v. Cummings*, 7 Allen, 307; see, also, *Coghill v. Boring*, 15 Cal. 213.

<sup>286</sup> *Grimes v. Fall*, 15 Cal. 63; *Weber v. Kingsland*, 8 Bosw. 415. When the evidence is conflicting, the trial court is authorized to review it, and if, in its opinion, the verdict is against the weight of the evidence, it is its duty to grant a new trial. *Domico v. Casassa*, 101 Cal. 411; and see *Bates v. Howard*, 105 id. 173; *Wilson v. Railroad Co.*, 94 id. 166; *Mullins v. Wieland*, 68 id. 231; compare *Smith v. Ireland*, 4 Utah, 187; *Bowers v. Railroad Co.*, id. 215; *Lehl Irrigation Co. v. Moyle*, id. 327; *San Gabriel Wine Co. v. Behlow*, 94 Cal. 110; *Winans v. Sierra Lumber Co.*, 66 id. 61; *Crystal Lake Ice Co. v. McAulay*, 75 id. 631; *Bernheim v. Christal*, 76 id. 567; *Harnett v. Railroad Co.*, 78 id. 31; *Driscoll v. Railway Co.*, 97 id. 553; *O'Donnell v. Bennett*, 12 Mont. 242; *Wallace v. Lewis*, 9 id. 398.

<sup>287</sup> *Thompson v. Lothrop*, 21 Pick. 340.

<sup>288</sup> *Whiting v. Otis*, 1 Bosw. 420.

<sup>289</sup> *Melton v. Cobb*, 21 Tex. 539; *Holbrook v. Jackson*, 7 Cush. 136.

<sup>290</sup> *Cunningham v. Kimball*, 7 Mass. 65.

<sup>291</sup> *Zelgler v. Wells*, 28 Cal. 263; *Renaud v. Peck*, 2 Hilt. 137; *Allen v. Blunt*, 2 Woodb. & M. 121; *Doane v. Baker*, 6 Allen, 260; *Hollinshead v. Nauman*, 45 Penn. St. 140; *Richardson v. Warren*, 6 Allen, 552.

<sup>292</sup> *Allen v. Blunt*, 2 Woodb. & M. 121.

its rejection was right.<sup>293</sup> Or no injustice was done by it.<sup>294</sup> Or if it was cumulative.<sup>295</sup> Or where it is afterwards made competent.<sup>296</sup> Or where the fact to be proved is mere surplusage, or not material to the decision of the action.<sup>297</sup> Or was not in issue. Or where its admission has not prejudiced the case.<sup>298</sup> Or could not have injured the defendant.<sup>299</sup> Or does not bear upon the question decided.<sup>300</sup> Or where the court instructs the jury to disregard such evidence.<sup>301</sup> Or where, under the decision admitting the evidence, no evidence is shown to have been given.<sup>302</sup> If the court erroneously rules that certain evidence is admissible, the opposite party is not prejudiced thereby, unless the ruling is followed by the introduction of the objectionable testimony.<sup>303</sup> A party is not injured by a refusal to strike out exceptionable testimony, if the same party afterwards introduces the same testimony, or if counsel afterwards concedes the facts stated in such testimony.<sup>304</sup> If the court erroneously allows respondent to introduce evidence upon matter not denied in the answer, but the appellant is not prejudiced thereby, a new trial will not be granted.<sup>305</sup> The admission of immaterial evidence to prove a conceded point furnishes no ground for a new trial.<sup>306</sup> It is no ground for a new trial that secondary evi-

<sup>293</sup> *Allen v. Blunt*, 2 Woodb. & M. 121.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*; *Smith v. Jensen*, 13 Col. 213.

<sup>296</sup> *Eastman v. Amoskeag Co.*, 44 N. H. 143; 82 Am. Dec. 201.

<sup>297</sup> *Clark v. Lockwood*, 21 Cal. 220; *Mills v. Barney*, 22 *id.* 240; *Allen v. Blunt*, 2 Woodb. & M. 121.

<sup>298</sup> *Horford v. Willson*, 1 Taunt. 12; *Cox v. Kitchin*, 1 Bos. & Pul. 338; *Allen v. Blunt*, 2 Woodb. & M. 121.

<sup>299</sup> *Dimmick v. Milwaukie R. R. Co.*, 18 Wis. 471.

<sup>300</sup> *Barry v. Bennett*, 7 Met. 354.

<sup>301</sup> *Union Water Co. v. Crary*, 25 Cal. 504; 85 Am. Dec. 145; *Randolph v. Woodstock*, 35 Vt. 291; *Smith v. Whitman*, 6 Allen, 562; but see *Green v. Hudson River R. R. Co.*, 32 Barb. 25.

<sup>302</sup> *Randolph v. Woodstock*, 35 Vt. 291; *Fowler v. Middlesex*, 6 Allen, 92.

<sup>303</sup> *Treat v. Reilly*, 35 Cal. 129.

<sup>304</sup> *Id.*

<sup>305</sup> *Wells v. McPike*, 21 Cal. 215; *Tully v. Harloe*, 35 *id.* 302; 95 Am. Dec. 102.

<sup>306</sup> *Sibley v. Leffingwell*, 5 Allen, 584; *Rand v. Dodge*, 17 N. H. 343. When an objection to material evidence is improperly sustained, and the result of the trial is adverse to the party against whom the ruling is made, the ruling may be made the ground for a new trial, unless there is something in the record showing that the sustaining

dence was admitted without a foundation for it being laid, if no objection was made to it.<sup>307</sup> Or that further evidence was allowed after the testimony was closed.<sup>308</sup> If the court refuse to allow an amendment to the answer, but admits evidence on the point to which the amendment referred, and it appears that the amendment is immaterial, no injury results from the refusal.<sup>309</sup> Where a referee erred in receiving certain evidence, yet where such evidence, by legal necessity, can do injury, it will not authorize a new trial.<sup>310</sup> When a witness is allowed to testify against the objection of a party to a cause, and the judge does not state the facts on which his opinion in favor of the competency of the witness depends, the parties disagreeing as to the facts, a new trial will be ordered.<sup>311</sup> Where the evidence is introduced without objection, new trial will not be granted on account of its incompetence.<sup>312</sup>

§ 4903. **Error in excluding evidence.** When the court refuses to allow the introduction of proper evidence, and plain- of the objection to the question was a harmless error. *Cravens v. Bennett*, 17 Col. 419.

<sup>307</sup> *Myer v. Avery*, 23 Ind. 510.

<sup>308</sup> *Mowry v. Starbuck*, 4 Cal. 274; *Brooks v. Crosby*, 22 id. 42; see *Howard v. Holbrook*, 9 Bosw. 237.

<sup>309</sup> *Jones v. Block*, 30 Cal. 227.

<sup>310</sup> *Forrest v. Forrest*, 6 Duer, 145; *Lowery v. Stewart*, 3 Bosw. 505; but see *Worrall v. Parmelee*, 1 N. Y. 519; *Osgood v. Manhattan Co.*, 3 Cow. 612.

<sup>311</sup> *State v. Norton*, 1 Wins. 303. Error in admitting evidence on behalf of the plaintiff, the only effect of which was to support an allegation of the answer, is not ground for reversal at the instance of the defendant. *Hewes v. Germain Fruit Co.*, 106 Cal. 441. Where error is committed in permitting the plaintiffs to ask a witness a question with a view to his impeachment, the error is harmless where the witness denies the imputed declarations and the testimony of the impeaching witness is subsequently stricken out by the court on defendant's motion. *Sears v. Railway Co.*, 6 Wash. St. 227. So, the erroneous admission of evidence may be cured by a subsequent instruction, given at the request of the appellant, counteravailing its effect. *Reuton v. Monnier*, 77 Cal. 449; *Lyts v. Reevey*, 5 Wash. St. 606. But error in admitting evidence upon a material question not in issue is not cured by amending the pleadings so as to present the issue. *Seymour v. Fisher*, 16 Col. 188.

<sup>312</sup> *Wait v. Maxwell*, 5 Pick. 217; *Rice v. Bancroft*, 11 id. 469; *Monson v. Palmer*, 3 Allen, 551; *Bullard v. Stone*, 67 Cal. 477. But see, as to the proper course where the objection arises from a defect in the pleading, *Carpentier v. Small*, 35 Cal. 346.

tiff becomes nonsuited, the judgment of nonsuit may be set aside and a new trial granted.<sup>313</sup> So, also, where all evidence offered by the plaintiff is excluded, and judgment rendered for defendant.<sup>314</sup> Where a portion of plaintiff's evidence was excluded, and the court of review comes to the conclusion that if the evidence excluded had been admitted plaintiff could not have recovered, a new trial will not be granted.<sup>315</sup> Or where the evidence was afterwards admitted.<sup>316</sup> Or if it is evident that the testimony offered could have no influence upon the verdict.<sup>317</sup> Or where conclusive evidence on the same point was subsequently admitted.<sup>318</sup> A new trial will be ordered on the improper exclusion of a witness, although it does not appear probable that his testimony could have affected the result.<sup>319</sup> But where the excluded testimony is afterwards admitted, or the point to which it is called is explained by other evidence, the error is cured.<sup>320</sup> The rejection of an unimportant deposition is not of itself alone cause for a new trial.<sup>321</sup>

§ 4904. **Error of law.** It is not an error of law that the evidence is insufficient to justify a particular finding of fact; and the same is true of the verdict of a jury.<sup>322</sup> A new trial will not be granted for an error by which the rights of the party were

<sup>313</sup> *Guffey v. Moseley*, 21 Tex. 408; see *Robison v. Lyle*, 10 Barb. 513.

<sup>314</sup> *Moore v. Bates*, 46 Cal. 29.

<sup>315</sup> *De Merle v. Mathers*, 26 Cal. 455.

<sup>316</sup> *Morgan v. Reid*, 7 Abb. Pr. 215; *Hicks v. Whiteside*, 23 Cal. 404; *Patchen v. Keeley*, 19 Nev. 404; *McKenzie v. Improvement Co.*, 5 Wash. St. 409; *St. Kevin Min. Co. v. Isaacs*, 18 Col. 400; *Froth v. Crow*, 1 Col. App. 454.

<sup>317</sup> *Carpenter v. Norris*, 20 Cal. 437; *City Bank of Brooklyn v. Dearborn*, 20 N. Y. 244.

<sup>318</sup> *Park Bank v. Tilton*, 15 Abb. Pr. 384.

<sup>319</sup> *Brown v. Richardson*, 20 N. Y. 472, 476; reversing S. C., 1 Bosw. 402; see, also, *Buck v. Hermance*, 1 Blatchf. 322.

<sup>320</sup> *People v. Woody*, 48 Cal. 81; *Byrne v. Jansen*, 50 id. 624; *Branson v. Caruthers*, 49 id. 374.

<sup>321</sup> *Hill v. Meyers*, 43 Penn. St. 170. A judge has not the right arbitrarily to reject evidence. *Prewett v. Dyer*, 107 Cal. 154. But where a question asked of a witness is irrelevant and immaterial it is not error to strike out the answer. *Mahan v. Wood*, 105 Cal. 12. And although the ground for excluding testimony may have been an improper one, yet if any good reason exists for its exclusion, the action of the court will be sustained. *Lyts v. Keevey*, 5 Wash. St. 606.

<sup>322</sup> *Smith v. Christian*, 47 Cal. 18.



not prejudiced.<sup>323</sup> Nor for an error favorable to the appellant.<sup>324</sup> A new trial will not be granted where a demurrer to a plea was erroneously sustained when defendant could have had the full benefit of the same defense under other pleas.<sup>325</sup> Nor upon refusal of a nonsuit, in cases where the deficiency was afterwards supplied.<sup>326</sup> Nor because counsel indulged in too great latitude, arguing as to inferences to be drawn from evidence.<sup>327</sup> If the court refuses a demand for a jury trial of issues of fact, a new trial will be granted, although the issues may have been fairly tried by the court.<sup>328</sup> The court will never grant a new trial where the decision is right upon the whole case, although the reason stated is not the true one on which the decision should have been based.<sup>329</sup> Nor where plaintiff could in no event recover more than nominal damages.<sup>330</sup> Nor on account of an erroneous ruling, when it is seen that the facts can not be changed, and the facts proved are conclusive in support of the judgment.<sup>331</sup> Nor where the court erroneously submitted a matter of law to the jury, and the verdict decided it correctly.<sup>332</sup> But where a question of fact, which ought to have been submitted to the jury, was decided by the court, a new trial will be granted,<sup>333</sup> unless submitted to without objection.<sup>334</sup> If the court makes a ruling during the progress of a trial, the party in whose favor the ruling is is entitled to have the cases decided according to the ruling, provided that if the ruling had been against him he might have been able to remove the objection made by the other party.<sup>335</sup>

<sup>323</sup> 2 Grah. & M. New Trial, 603; *Tyler v. Green*, 28 Cal. 406; 87 Am. Dec. 130; *Carpentier v. Gardiner*, 29 Cal. 160; *Mott v. Reyes*, 45 id. 379; *Chipley v. Farris*, id. 527; *Eckert v. Cameron*, 43 Penn. St. 120; *McKay v. Leonard*, 17 Iowa, 469; *Overland Mail, etc., Co. v. Carroll*, 1 West Coast Rep. 281.

<sup>324</sup> *Wilkinson v. Parrott*, 32 Cal. 102.

<sup>325</sup> *Powell v. Asten*, 36 Ala. 140.

<sup>326</sup> *Schenectady, etc., Co. v. Thatcher*, 11 N. Y. 102; *Oolvin v. Burnet*, 2 Hill, 620; *Kent v. Harcourt*, 33 Barb. 491.

<sup>327</sup> *United States v. Flowery*, 1 Sprague, 109.

<sup>328</sup> *Treadway v. Wilder*, 12 Nev. 108.

<sup>329</sup> *Munroe v. Potter*, 22 How. Pr. 49; see, also, *Kidd v. Teeple*, 22 Cal. 255.

<sup>330</sup> *Hopkins v. Grinnell*, 28 Barb. 533; *McConihe v. N. Y. & E. R. R. Co.*, 20 N. Y. 495; 75 Am. Dec. 420.

<sup>331</sup> *Brown v. Bowen*, 30 N. Y. 519; 86 Am. Dec. 406.

<sup>332</sup> *Stokes v. Arey*, 8 Jones L. 66.

<sup>333</sup> *San Francisco v. Clark*, 1 Cal. 386.

<sup>334</sup> *Clark v. Mayor of New York*, 24 How. Pr. 333.

<sup>335</sup> *Carpentier v. Small*, 35 Cal. 346.



§ 4905. **Error in instructions.** Where an erroneous instruction has been given, which may have influenced the verdict, a new trial will be granted;<sup>336</sup> for example, instruction on matter of fact.<sup>337</sup> But where no other conclusion than that directed by the court could be arrived at from the evidence, it is error without prejudice, and, therefore, not ground for reversal.<sup>338</sup> Or where the judge refused instructions on a matter of law.<sup>339</sup> But where incorrect instructions are given in favor of defendant, he can not complain of the error.<sup>340</sup> Or an error which does not militate against appellant,<sup>341</sup> or injure him.<sup>342</sup> Or a mere want of perspicuity in framing the instruction.<sup>343</sup> A new trial will not be granted on the ground of erroneous instructions as to measure of damages, if it appear by bill of exceptions that the damages assessed were not too great.<sup>344</sup> Or where, notwithstanding such instruction, the jury came to the proper understanding, and rendered a correct verdict.<sup>345</sup> When a single statement in a judge's charge contains two propositions, one of which is erroneous, court will order a new trial if it appear the jury was misled thereby.<sup>346</sup> The whole charge to the jury should be taken together, and if the case appears to have been fairly presented to the jury, the verdict will not be

<sup>336</sup> *Slaughter v. Fowler*, 44 Cal. 195; *Younge v. Pacific Mail S. S. Co.*, 1 id. 353; *Miller v. Stewart*, 24 id. 502; *Gale v. Wells*, 12 Barb. 85; *Hunter v. Ousterhoudt*, 11 id. 33; *Scott v. Lunt*, 7 Pet. 596; *Rochell v. Phillips*, Hempst. 22; *United States v. Beatty*, id. 487.

<sup>337</sup> *Pico v. Stevens*, 18 Cal. 376.

<sup>338</sup> Id. Erroneous instruction as ground for reversal. See *Haight v. Vallet*, 89 Cal. 245; *Zaro v. Dakan*, 76 id. 565; *Cleary v. Railroad Co.*, id. 240; *Mining Co. v. Bouscher*, 9 Col. 385; *Nuckalls v. Gant*, 12 id. 361; *Perot v. Cooper*, 17 id. 80; *Buchtel v. Evans*, 21 Oreg. 309; *Flick v. Mining Co.*, 8 Mont. 298; also, § 4689, *ante*.

<sup>339</sup> *Emerson v. Hogg*, 2 Blatchf. 1.

<sup>340</sup> *Gaven v. Dopman*, 5 Cal. 342; *Wilkinson v. Parrott*, 32 id. 102.

<sup>341</sup> *People v. Moore*, 8 Cal. 94.

<sup>342</sup> *Thompkins v. Mahoney*, 32 Cal. 231; *Fagan v. Williamson*, 8 Jones L. 433; *Hook v. Craghead*, 35 Mo. 380; *Winans v. Sierra Lumber Co.*, 66 Cal. 61; *Bassett v. Inman*, 2 West Coast Rep. 534.

<sup>343</sup> *People v. Moore*, 8 Cal. 94; *McKinney v. Smith*, 21 id. 374; *Hooksett v. Amoskeag, etc., Co.*, 44 N. H. 105.

<sup>344</sup> *Couillard v. Duncan*, 6 Allen, 440.

<sup>345</sup> *Haskell v. McHenry*, 4 Cal. 411; *Pratte v. Judge Court Com. Pleas*, 12 Mo. 194; *Marclay v. Shults*, 29 N. Y. 346.

<sup>346</sup> *Green v. Hudson River R. R. Co.*, 32 Barb. 25; *Downing v. Bartels*, 2 West Coast Rep. 506.

disturbed.<sup>347</sup> Where several defenses are pleaded, either of which is good in law, and the court errs in its instructions as to one of the defenses, unless it appear that the verdict was rendered on a defense in relation to which no error was committed, a new trial will be granted.<sup>348</sup> So where the verdict involves more than one issue, if the charge is erroneous as to either issue.<sup>349</sup> Or if there is some evidence, although it may have been slight, upon which the instructions were based.<sup>350</sup> Wherever the court, on a supposed state of facts, instructs the jury if they so find the facts to render a verdict for the plaintiff, when the instruction should have been to find in that event a verdict for the defendant, the remedy, if no exception is taken, is to move on a case for a new trial.<sup>351</sup> If a party desires to call the attention of the judge to the fact that he was mistaken as to certain evidence having been given as stated in the charge, he should do so directly and in a way to inform the judge thereof, and request him to admonish the jury that in fact no such evidence had been given, and if the judge from misapprehension refuse to correct the error, the party prejudiced thereby would be entitled to relief on his motion for a new trial on a case.<sup>352</sup> If a fact is improperly found, the proper remedy is a new trial.<sup>353</sup> Though the instruction given at the request of a party was inaccurate, yet if it was not excepted to, and the jury did not find in conformity to it, a new trial should not be granted.<sup>354</sup> Where an erroneous instruction is given to the jury the judgment will be reversed unless it appear that appellant was not prejudiced thereby.<sup>355</sup> The judge has a right to aid the jury by an expression of his opinion upon the effect of the evidence, but not so as to mislead or control their deliberations; that

<sup>347</sup> Carrington v. Pacific Mail S. S. Co., 1 Cal. 475; Dwinelle v. Henriques, 1 id. 387; Brooks v. Crosby, 22 id. 42; People v. Cleveland, 49 id. 578; People v. Dennis, 39 id. 625; Burton v. Merrick, 21 Ark. 357; People v. Biggins, 65 Cal. 564; People v. Turcott, 65 id. 126; People v. McDowell, 64 id. 467.

<sup>348</sup> Wiseman v. McNulty, 25 Cal. 234.

<sup>349</sup> Whitacre v. Culver, 8 Minn. 133; and see § 4689, *ante*.

<sup>350</sup> Perlberg v. Gorham, 10 Cal. 120.

<sup>351</sup> Brush v. Kohn, 9 Bosw. 589.

<sup>352</sup> Varnam v. Taylor, 10 Bosw. 148.

<sup>353</sup> North Am. Oil Co. v. Forsyth, 48 Penn. St. 291.

<sup>354</sup> See Rogers v. Murray, 3 Bosw. 357. Necessity of excepting to an error in the instructions to the jury. See Railroad Co. v. Superior Ct., 105 Cal. 84; Sharp v. Hoffman, 79 id. 404.

<sup>355</sup> Richardson v. McNulty, 24 Cal. 330.

which a jury have a right to decide ought to be so submitted as to leave them free to decide it either way.<sup>356</sup>

§ 4906. **Error as to one affects all.** If an order or decision of the court, made on the motion or at the request of one of several defendants, be erroneous, the responsibility will attach alike to all the defendants, unless it appears that the order or decision was clearly restricted, or would necessarily have an application only to particular defendants or their interests.<sup>357</sup>

§ 4907. **Error in findings.** Where certain findings are unsupported by any evidence, such findings should be set aside, and a new trial granted.<sup>358</sup> If on the trial the court finds from the evidence all the facts necessary to entitle the plaintiff to recover, and upon re-examination, on motion for a new trial, finds that a fact essential to plaintiff's recovery is not proved, a new trial should be granted.<sup>359</sup> If a defense should be specially pleaded, the omission to plead it is not cured by the introduction without objection of evidence in support of it, and the findings of the fact in relation to it by the court.<sup>360</sup> If the findings follow the issues, and a demurrer would not be sustained to the complaint, judgment will not be arrested on the findings.<sup>361</sup> Nor for inaccuracy in the language of a finding sufficiently distinct as to a material question involved.<sup>362</sup>

§ 4908. **Exceptions must be taken at the trial.** Exceptions must be taken to the ruling of the court.<sup>363</sup> Where a party wishes to put on record, for purposes of review, the decision of the court on a matter of fact, the only mode is to request that written findings be filed, and on failure or refusal to do so,

<sup>356</sup> *Mohney v. Evans*, 51 Penn. St. 80; see *Battersby v. Abbott*, 9 Cal. 565; and *Aylwin v. Ulmer*, 12 Mass. 22.

<sup>357</sup> *Judson v. Malloy*, 40 Cal. 307.

<sup>358</sup> *Smith v. Athern*, 34 Cal. 506; *Felton v. Le Breton*, 92 id. 457.

<sup>359</sup> *Hawkins v. Reichert*, 28 Cal. 534.

<sup>360</sup> *McComb v. Reed*, 28 Cal. 281; 87 Am. Dec. 115; *Smith v. Owens*, 21 Cal. 11. A judgment based upon contradictory findings is a decision against law, for which a new trial may be had. *Langan v. Langan*, 89 Cal. 186.

<sup>361</sup> *Millard v. Hathaway*, 27 Cal. 119.

<sup>362</sup> *McKinney v. Smith*, 21 Cal. 374.

<sup>363</sup> *McCloud v. O'Neill*, 16 Cal. 392; *Russell v. Union Ins. Co.*, 1 Wash. C. C. 440; *Farmers' Loan and Trust Co. of New York v. McKinney*, 6 McLean, 1; see *ante*, "Exceptions;" *Leahy v. S. P. R. R. Co.*, 65 Cal. 150; *Territory v. Young*, 4 id. 468; *Cook v. Territory*, id. 430; *Evans v. Jones*, 10 Utah, 182.

to except for want of findings. A decision by the court on a matter of fact can not be established by affidavit on motion for new trial.<sup>364</sup> If an objection is taken to evidence by counsel, and the objection is overruled by the court, and no exception is taken to the ruling, the presumption is that the counsel acquiesced in the ruling.<sup>365</sup> If incompetent testimony is admitted without objection, the court will treat the testimony as competent on motion for nonsuit, and on motion for new trial.<sup>366</sup> The nature of the objections to the admission of evidence must be shown.<sup>367</sup>

§ 4909. **Excessive damages.** Courts will grant a new trial where the damages are unjustifiable or grossly inconsistent with the facts of the case.<sup>368</sup> The mere fact that damages are excessive is not a ground for new trial; they must appear to have been given under the influence of passion or prejudice.<sup>369</sup> But where the verdict is for a sum greatly disproportionate to the injury, that is of itself evidence that it was rendered under the influence of passion or prejudice.<sup>370</sup> In case the verdict exceeds the damages claimed in the complaint, a new trial will be granted.<sup>371</sup> But a new trial will not be granted where the ver-

<sup>364</sup> *Sanchez v. McMahon*, 35 Cal. 218.

<sup>365</sup> *Turner v. Tuolumne Co. Water Co.*, 25 Cal. 404.

<sup>366</sup> *Janson v. Brooks*, 29 Cal. 214.

<sup>367</sup> *Cox v. Jackson*, 6 Allen, 108.

<sup>368</sup> *McDaniel v. Baca*, 2 Cal. 326; 56 Am. Dec. 339; *Potter v. Seale*, 5 Cal. 410; see, also, *Pleasants v. N. B. & M. R. R. Co.*, 34 id. 586; *Gleason v. Bremen*, 50 Me. 222; *Scherpf v. Szadeczky*, 1 Abb. Pr. 366; *Blum v. Higgins*, 3 id. 104; *Fry v. Bennett*, 9 id. 45; *Knight v. Wilcox*, 18 Barb. 212; *Clapp v. Hudson River R. R. Co.*, 16 id. 461; *Hamilton v. Third Ave. R. R. Co.*, 48 How. Pr. 50; *Duffy v. Chicago, etc., Railway Co.*, 34 Wis. 188; *Patten v. Chicago, etc., R. R. Co.*, 36 id. 413.

<sup>369</sup> *M. K. & T. R. R. Co. v. Weaver*, 16 Kan. 456; Cal. Code Civ. Pro., § 657, subd. 5.

<sup>370</sup> *Kinsey v. Wallace*, 36 Cal. 481; *McCarty v. Fremont*, 23 id. 197; compare *Benjamin v. Stewart*, 61 id. 605; *Morgan v. South. Pac. Co.*, 95 id. 501; *Gorman v. South. Pac. Co.*, 97 id. 1; 33 Am. St. Rep. 157.

<sup>371</sup> *Palmer v. Reynolds*, 3 Cal. 396; *McIntire v. Clark*, 7 Wend. 330; see, also, *Dox v. Dey*, 3 id. 356; *Corning v. Corning*, 6 N. Y. 97; *Decker v. Parsons*, 11 Hun, 295; *Manson v. Robinson*, 37 Wis. 339; *Garlick v. Bower*, 62 Cal. 65; *Vanderford v. Foster*, id. 179; *contra*; *Webb v. Thompson*, 23 Ind. 428. There is no reason for holding the amount of damages excessive as ground for new trial where the sum allowed is less than that claimed in the complaint, and the un-

dict exceeds the amount of damages laid in the writ, but not the amount laid in the declaration.<sup>372</sup> But the excess may be remitted and the judgment stand.<sup>373</sup> So, also, in other cases of excessive damages.<sup>374</sup> This, however, is in the discretion of the court.<sup>375</sup> But although there are cases in which the courts have reduced the verdict where the damages were excessive, it would seem to be doubtful practice in actions for personal injuries.<sup>376</sup> The offer to remit comes too late after new trial granted.<sup>377</sup> In actions for personal torts, the law fixes no precise rule of damages, but leaves their assessment to the unbiased judgment of the jury; and the verdict will not be disturbed on the ground of excessive damages unless the amount is so disproportionate to the injury as to justify the conclusion that the verdict is not the result of the cool, dispassionate consideration of the jury.<sup>378</sup>

**§ 4910. Exemplary or punitive damages.** Where punitive damages are allowable, they should bear proportion to the actual damage; and if they fail to do so, whether too small or too great,

contradicted evidence of the plaintiff shows that he suffered twice as much damage as that claimed. *Perira v. Smith*, 79 Cal. 232.

<sup>372</sup> *Roderick v. Railroad Co.*, 7 W. Va. 54.

<sup>373</sup> *Pierce v. Payne*, 14 Cal. 420; *Manson v. Robinson*, 37 Wis. 339.

<sup>374</sup> *McLaughlin v. Wash. County Mut. Ins. Co.*, 23 Wend. 525; *Jansen v. Ball*, 6 Cow. 628; *Diblin v. Murphy*, 3 Sandf. 19; *Clapp v. Hudson River R. R. Co.*, 19 Barb. 461; *Murray v. Same*, 47 id. 196; *Collins v. Albany & S. R. R. Co.*, 12 id. 492; *Devore v. McDermitt*, 47 Ind. 234; *Scott v. Lillenthal*, 9 Bosw. 224.

<sup>375</sup> *Clark v. Huber*, 20 Cal. 198; *Davis v. South. Pac. Co.*, 98 id. 13; *Winter v. Shoudy*, 9 Wash. St. 52; and see *Gardner v. Tatum*, 81 Cal. 370.

<sup>376</sup> *Gale v. N. Y. Cent. & H. R. R. Co.*, 53 How. Pr. 385; but see *Johnson v. Root*, 2 Fish. Pat. Cas. 291.

<sup>377</sup> *Hill v. Newman*, 47 Ind. 187.

<sup>378</sup> *Aldrich v. Palmer*, 24 Cal. 513; *Wheaton v. N. B. & M. R. R. Co.*, 36 id. 591; *Myers v. San Francisco*, 42 id. 215; *Russell v. Denison*, 45 id. 337; *Lee v. South. Pac. R. R. Co.*, 101 Cal. 118; *Fisher v. South. Pac. R. R. Co.*, 89 id. 399; *Griffiths v. Clift*, 4 Utah. 462; *Coleman v. Southwick*, 9 Johns. 45; 6 Am. Dec. 253; *Southwick v. Stevens*, 10 Johns. 443; *McConnell v. Hampton*, 12 id. 234; *Sargent v. ———*, 5 Cow. 106; *Moody v. Baker*, id. 351; *Travis v. Barger*, 24 Barb. 614; *Parker v. Lewis*, Hempst. 72; *Palmer v. Fiske*, 2 Curt. C. C. 14; *Swan v. Bowie*, 2 Cranch C. C. 221; *St. Paul v. Kuby*, 8 Minn. 154; *Miss. Cent. R. R. Co. v. Caruth*, 51 Miss. 77; *C. & A. R. R. Co. v. Wilson*, 63 Ill. 167.

the court should award a new trial.<sup>379</sup> If the court instruct the jury that they "can not find vindictive damages," and the jury, notwithstanding the instruction, do find such damages, that in itself is not sufficient ground for a new trial, if the verdict be not excessive.<sup>380</sup>

§ 4911. **Erroneous rule in assessing damages.** Where the jury adopt a rule of compensation, not justified by the evidence and at variance with the instructions of the court, a new trial should be granted.<sup>381</sup> In a case of infringement of patent, if the court instruct the jury that if their verdict be for plaintiff it must be for nominal damages only, and they return a verdict for five hundred dollars, it was held that while errors of this description may sometimes be obviated by allowing the prevailing party to remit the excess when the court is satisfied that the error arose from oversight or inadvertence, yet when the finding is not only contrary to the evidence but in direct contravention of the charge of the court, the verdict will be set aside and a new trial granted.<sup>382</sup>

§ 4912. **Facts must be shown.** The facts should be stated, from which the court can perceive whether the damages are excessive, and whether on another trial there would be any probability of a verdict for a less amount, or that there is any defense to the claim.<sup>383</sup> If the statement shows that too high a rate of interest was allowed by the jury upon an account sued on, for a part of the time, a new trial will be granted unconditionally unless it appears that plaintiff had not kept his account for the residue of the time upon the erroneous basis of

<sup>379</sup> *Mobile, etc., R. R. Co. v. Ashcraft*, 48 Ala. 15. The question whether the acts of a defendant resulting in personal injuries to the plaintiff were accompanied by oppression, fraud, or malice, so as to authorize the giving of exemplary damages, is a fact to be determined by the jury from the evidence before it, and where there is a substantial conflict of evidence thereon its verdict will not be interfered with upon appeal. But the trial court may, if, in its opinion, the evidence was insufficient to show that there had been any fraud, oppression, or malice, on the part of the defendant, grant a new trial, notwithstanding the verdict of the jury. *Domico v. Casassa*, 101 Cal. 411.

<sup>380</sup> *Dye v. Denham*, 54 Ga. 224; but see *Wilson v. Fitch*, 41 Cal. 363.

<sup>381</sup> *Karr v. Parks*, 44 Cal. 50.

<sup>382</sup> *Johnson v. Root*, 2 Fish. Pat. Cas. 291; see *Whitney v. Emmett*, Baldw. 325.

<sup>383</sup> *Patterson v. Ely*, 19 Cal. 28.

interest, and he will consent to remit the excess.<sup>384</sup> Circumstances must show that the jury have made some mistake in the rules of law applicable, or in their mode of computation, or that they have been actuated by passion or prejudice, or some improper feeling.<sup>385</sup>

§ 4913. **Inadequate damages.** A new trial will be granted for inadequacy of damages as well as for excessive damages,<sup>386</sup> especially where the amount shows a compromise.<sup>387</sup>

§ 4914. **Insufficient grounds.** It is no ground for a new trial of the issues of fact that the judgment is broader than the facts alleged and found would justify. Such an error does not affect the findings where it occurred in entering the judgment subsequent to the findings.<sup>388</sup> The court will not grant a new trial on the ground of excessive damages when the verdict was in accordance with the direction of the court;<sup>389</sup> or where the defendant leaves the matter to general inference;<sup>390</sup> or where the claim for damages rests entirely on the uncontrovered allegations of the complaint, judgment will not be disturbed;<sup>391</sup> or where defendants admit that the amount claimed is correct;<sup>392</sup> or that the verdict was entered for the amount due instead of the penalty of the bond, and that the recovery was for a sum greater than was claimed by the *ad damnum* in the declaration, were not sufficient for a new trial.<sup>393</sup>

§ 4915. **Libel and slander.** It is only in rare cases, and where the damages are obviously and grossly excessive, that a new trial

<sup>384</sup> Clark v. Gridley, 35 Cal. 398.

<sup>385</sup> Aldrich v. Palmer, 24 Cal. 513; Boyce v. California Stage Co., 25 id. 460.

<sup>386</sup> Hall v. Bark Emily Banning, 33 Cal. 522; Mariani v. Dougherty, 46 id. 26; Wolford v. Mining Co., 63 Cal. 483; Bennett v. Hobro, 72 id. 178; Learned v. Castle, 78 id. 454; McDonald v. Walter, 40 N. Y. 551; Richards v. Sandford, 2 E. D. Smith, 349; Robbins v. Hudson River R. R. Co., 7 Bosw. 1; see Moore v. Wood, 19 How. Pr. 405; Taylor v. Howser, 12 Bush, 465.

<sup>387</sup> Falvey v. Stanford, L. R., 10 Q. B. 54.

<sup>388</sup> Shepard v. McNell, 38 Cal. 72.

<sup>389</sup> Stimpson v. The Railroads, 1 Wall. jun. C. C. 164.

<sup>390</sup> Stephens v. Felt, 2 Blatchf. 37.

<sup>391</sup> Patterson v. Ely, 19 Cal. 28.

<sup>392</sup> Rowe v. Smith, 10 Bosw. 268.

<sup>393</sup> Huff v. Hutchinson, 14 How. (U. S.) 586.



will be granted in a case of libel or slander.<sup>394</sup> But in action for libel, if there is no proof of malice, and the publication is made in the usual course of defendant's business as public journalist in the full belief of the truth of the article after careful inquiry from an apparently reliable source, the jury should not award punitive damages; and to do so would be a ground for new trial.<sup>395</sup>

§ 4916. **Legal effect of evidence.** But where the jury acted under a mistaken impression as to the legal effect of evidence, or in a total disregard of it, a new trial will be granted.<sup>396</sup> A new trial will not be granted on the affidavits of jurors that the jury misapprehended the testimony, where no reasonable ground for such misapprehension appears.<sup>397</sup>

§ 4917. **New trial will be granted.** Where an attorney appears and conducts the defense, the remedy of defendant is by motion for a new trial; but where such attorney appears without authority and by mistake, the remedy may be by motion for relief from the judgment.<sup>398</sup> Where judgment is founded in part upon a betting contract, a new trial will be granted;<sup>399</sup> or where the referee decided against the weight of evidence, and erred in the application of the rules of law,<sup>400</sup> or the evidence is overwhelmingly against the finding.<sup>401</sup> It is error when a particular fact in a cause is found by a jury to enter judgment for the party against whom it was found, on the ground that

<sup>394</sup> *Root v. King*, 7 Cow. 613; *Tillotson v. Cheetham*, 2 Johns. 63; *Cook v. Hill*, 3 Sandf. 341; *Ostrom v. Calkins*, 5 Wend. 263; *Kyckman v. Parkins*, 9 Id. 470; *Lowe v. Herald Co.*, 6 Utah, 175.

<sup>395</sup> *Wilson v. Fitch*, 41 Cal. 363; see, also, *Potter v. Thompson*, 22 Barb. 87; compare *Mowry v. Raabe*, 89 Cal. 606; *Childers v. San Jose Mercury*, 105 Id. 284. In an action for a libel, the question of damages is for the jury, and the court can not assume, as a matter of law, that the plaintiff is entitled to only nominal damages. *Lick v. Owen*, 47 Cal. 252; *Taylor v. Hearst*, 107 Id. 262.

<sup>396</sup> *Minturn v. Burr*, 20 Cal. 48; *Todd v. Boone Co.*, 8 Mo. 431; *Fulkerson v. Bollinger*, 9 Id. 228; *Wilkinson v. Greeley*, 1 Curt. O. O. 63; *Moran v. Bogert*, 16 Abb. Pr. (N. S.) 303.

<sup>397</sup> *Jack v. Naber*, 15 Iowa, 450; *Moffit v. Rogers*, Id. 453.

<sup>398</sup> Cal. Code Civ. Pro., § 473; *McKinley v. Tuttle*, 34 Cal. 235.

<sup>399</sup> *Sisk v. Evans*, 8 Mo. 52.

<sup>400</sup> *Brown v. Penfield*, 24 How. Pr. 64.

<sup>401</sup> *Carpentier v. Gardiner*, 29 Cal. 164; *Branson v. Caruthers*, 49 Id. 375; see, also, *Walsh v. Hill*, 41 Id. 571; *Guerrero v. Ballerino*, 48 Id. 118.



the evidence was insufficient to establish it. The proper remedy is a new trial.<sup>402</sup> Where the finding is opposed to the evidence, a new trial will be granted;<sup>403</sup> but it must be palpably so;<sup>404</sup> or not sustained by the evidence;<sup>405</sup> or where the evidence has failed to support several material allegations of the complaint;<sup>406</sup> or where the findings are not warranted by the evidence.<sup>407</sup> This rule applies to law and equity cases alike,<sup>408</sup> and to findings by referees.<sup>409</sup> But the evidence must be such that if questions had been submitted to a jury, the court would set aside the verdict as contrary to evidence;<sup>410</sup> where the verdict is obtained on improper or incompetent evidence, but it must be objected to at the time to constitute it a ground for new trial;<sup>411</sup> or where there is no evidence upon a point essential to sustain the verdict;<sup>412</sup> or an essential finding of the court.<sup>413</sup> A verdict for a tenant claiming title by twenty years' possession can not be sustained without evidence that his possession was adverse to the title of the true owner.<sup>414</sup> So, also, where a

<sup>402</sup> *North American Oil Co. v. Forsyth*, 48 Penn. St. 291; and see *Rudolph v. North*, 6 Dak. 79.

<sup>403</sup> *Franklin v. Dorland*, 28 Cal. 175; 87 Am. Dec. 111; *Lyle v. Rollins*, 25 id. 437; *Slocum v. Lurty*, Hempst. 431; *Zantzinger v. Weightman*, 2 Oranch C. C. 478; *Wilson v. Janes*, 3 Blatchf. 227.

<sup>404</sup> *Hunt v. Hunt*, 3 B. Mon. 575.

<sup>405</sup> *Cox v. Hamilton*, 21 Tex. 777; *Pederson v. Railway Co.*, 6 Wash. St. 202.

<sup>406</sup> *Watkins v. Rogers*, 21 Ark. 298.

<sup>407</sup> *Bolton v. Stewart*, 29 Cal. 615; see, also, *Appeal of Piper*, 32 id. 530; affirmed in *Appeal of Brooks*, id. 559.

<sup>408</sup> *Doe v. Vallejo*, 29 Cal. 386.

<sup>409</sup> *Brady v. Brown*, 20 Cal. 520; *Cappe v. Brizzolara*, 19 id. 607; *Brown v. Penfield*, 24 How. Pr. 64.

<sup>410</sup> *Moore v. Murdock*, 26 Cal. 524; see § 4704, *ante*.

<sup>411</sup> *McCloud v. O'Neill*, 16 Cal. 392; *Hahn v. Van Doren*, 1 E. D. Smith, 411; *Anderson v. Busteed*, 5 Duer, 485; *Travis v. Barger*, 24 Barb. 614; *Weeks v. Lowerre*, 8 id. 530; *Clark v. Crandall*, 3 Barb. 612; *Vallance v. King*, id. 548.

<sup>412</sup> *Cummins v. Scott*, 20 Cal. 83; *Jackson v. Sacramento R. R. Co.*, 23 id. 268; *Doll v. Anderson*, 27 id. 250; *White v. Claves*, 32 Ill. 325; *Rathbone v. Stanton*, 6 Barb. 141; *Bailey v. Ellis*, 21 Ark. 488; *Backus v. Clark*, 1 Kan. 303; 83 Am. Dec. 437; *Wright v. Orient Ins. Co.*, 6 Bosw. 269; compare *Kinsman v. New York Mut Ins. Co.*, 5 id. 460.

<sup>413</sup> *Smith v. Athearn*, 34 Cal. 506; *Himmelmann v. Spanagel*, 39 id. 389; *Moss v. Atkinson*, 44 id. 16.

<sup>414</sup> *Eaton v. Jacobs*, 49 Me. 559.

verdict is void for repugnancy or uncertainty;<sup>415</sup> or where complaints claims on two distinct grounds, and some of the jury might have decided on one and some on the other;<sup>416</sup> or where several counts are abandoned, and the verdict is rendered upon two counts which do not lay a foundation for the damages found by the jury;<sup>417</sup> or if one of the counts is defective, or an error has been committed as to one of them.<sup>418</sup>

<sup>415</sup> *Stearns v. Barrett*, 1 Mason, 153; and see *Thompson v. Carberry*, 2 Cranch C. C. 39.

<sup>416</sup> *Biggs v. Barry*, 2 Curt. C. C. 259.

<sup>417</sup> *Jones v. Vanzandt*, 2 McLean, 611.

<sup>418</sup> *Wilson v. Tatum*, 8 Jones L. 300; *Middlesex Canal v. McGregore*, 3 Mass. 124; see, also, *United States v. Smith*, 3 Blatchf. 225. *New trial refused*.—A new trial should be refused when it is made apparent to the court that it would be unavailing. *Tolmie v. Dean*, 1 Wash. Ter. 46. Counsel must be allowed some latitude in argument, and illogical reasoning or incorrect inferences constitute no ground for a new trial. *Sears v. Railway Co.*, 6 Wash. St. 227. An order of the court made before trial is not an error which can be made a ground for a new trial. *Cattle Co. v. Ouster County*, 9 Mont. 145. Nor is an erroneous ruling that works no prejudice to the party complaining cause for a new trial. *Newberg v. Farmer*, 1 Wash. St. 182; and see *Higley v. Gilmer*, 3 Mont. 438. A new trial can not be had in cases of default. *Savings, etc., Society v. Meeks*, 66 Cal. 371. Where all the facts are agreed upon, there is no issue of fact to be re-examined, and no ground for a new trial. *Gregory v. Gregory*, 102 Cal. 50. A new trial will not be granted on the ground that certain findings are not within the issues raised by the pleadings, when the action was tried without objection to the sufficiency of the pleadings to raise such issues, and the findings are justified by the evidence. *Moore v. Campbell*, 72 Cal. 251. Nor will a new trial be granted merely because of an unnecessary and immaterial statement in the conclusions of law. *People v. Center*, 66 Cal. 551. Insufficiency of the evidence to justify the judgment, and objection to the judgment, as being contrary to law, are not grounds upon which a motion for a new trial can be granted. *Curtis v. Walling*, 2 Idaho, 383; see, also, *Shanklin v. Hall*, 100 Cal. 28; *Pierce v. Willis*, 108 id. 91. Failure of the trial judge to file his decision with the clerk within thirty days after the submission of the cause is not ground for a new trial. *McLennan v. Bank*, 87 Cal. 569. A new trial will not be ordered by the Supreme Court of New Mexico on the application of a plaintiff in error, on the ground that by the resignation of the judge before whom the cause was tried he has lost his right to have the judgment reviewed, when both the record and bill of exceptions have been struck from the files for the reason of not being signed and sealed by the judge who tried the cause. *Wheeler v. Pick*, 4 N. Mex. 149. An erroneous ruling on a demurrer

§ 4918. **Statement must contain.** Specifications in a statement of "particulars in which the court erred" can not be considered as specifications in which the evidence is insufficient.<sup>419</sup> Errors in law must be specified in the statement in case they are relied upon, or it is error to grant a new trial on that ground.<sup>420</sup> Where a statement on motion for a new trial fails to specify wherein the evidence is insufficient to justify the decision, such insufficiency, as a ground of the motion, will be disregarded.<sup>421</sup> It must specify the particulars in which the evidence is alleged to be insufficient.<sup>422</sup> And if the objection to the verdict is that it is against the weight of evidence, must set forth all the testimony.<sup>423</sup> But the presumption is that the statement contains all the evidence relating to the point specified, although the record does not affirmatively show that such is the case.<sup>424</sup> Where the statement on motion for a new trial did not contain that part of the evidence upon the sufficiency of which the truth of implied findings of fact depended, but showed merely that the moving party at the trial "introduced evidence tending to prove" a state of facts adverse to those thus impliedly found, and the express findings were clearly sustained by the evidence set out in the statement, it was held that the statement was insufficient to show the moving party entitled to a new trial, because it did not appear that said evidence which "tended to prove" amounted in fact to proof of said state of facts.<sup>425</sup> If the moving party, on motion for new trial, intends to rely on the point that a finding of fact is contrary to the evidence, he should specify in his statement wherein such finding is not justified by the evidence. It is not

to a pleading is not an error for which a new trial will be granted under the Wyoming statute (R. S., Wyo., § 2652). *Perkins v. McDowell*, 3 Wyo. 328.

<sup>419</sup> *Smith v. Christian*, 47 Cal. 18.

<sup>420</sup> *McWilliams v. Herschman*, 5 Nev. 263.

<sup>421</sup> *Sanchez v. McMahon*, 35 Cal. 218; *Pralus v. Pacific G. & S. Min. Co.*, 35 Cal. 30; *Gregory v. Gregory*, 102 id. 50; § 4900, *ante*; *Gilberson v. Smelting Co.*, 4 Utah, 46.

<sup>422</sup> *Love v. Sierra Nevada Lake Water and Min. Co.*, 32 Cal. 639; 91 Am. Dec. 602; *Elder v. Shaw*, 12 Nev. 78; see *Bailey v. Papina*, 20 id. 177.

<sup>423</sup> *Libby v. Dalton*, 9 Nev. 23; *Dawley v. Hovious*, 23 Cal. 103; § 4900, *ante*.

<sup>424</sup> *Hidden v. Jordan*, 28 Cal. 301; *Clark v. Gridley*, 35 id. 403.

<sup>425</sup> *Morrill v. Chapman*, 35 Cal. 85.

sufficient for him to state generally that the evidence is insufficient to justify the findings.<sup>426</sup>

§ 4919. **Verdict against law.** A verdict against the instructions of the court should be set aside.<sup>427</sup> A jury is bound to take the law from the court, and can not disregard an instruction upon that subject, however erroneous it may be.<sup>428</sup> A verdict of a jury in disobedience to the instructions of the court upon a point of law is a verdict against law, and for that reason should be set aside without further consideration.<sup>429</sup> An averment that the verdict is against law is not sustained by showing that it is unsupported by the evidence.<sup>430</sup>

§ 4920. **Weight of evidence.** In some extraordinary cases where the verdict of a jury is clearly against the weight of evidence, a new trial will be awarded;<sup>431</sup> but the Supreme Court will not interfere with a verdict of a jury on the ground that it is against the weight of evidence, except in extraordinary cases.<sup>432</sup> To justify the court in setting aside the verdict as against the weight of evidence, the court should be brought to the irresistible conclusion that the verdict was not the free,

<sup>426</sup> *Beans v. Emanuelli*, 36 Cal. 117; and see § 4901, *ante*.

<sup>427</sup> *Farley v. Budd*, 14 Iowa, 289.

<sup>428</sup> *Sweetman v. Prince*, 62 Barb. 256; *Clark v. Richards*, 3 E. D. Smith, 89.

<sup>429</sup> *Emerson v. Santa Clara Co.*, 40 Cal. 543.

<sup>430</sup> *Brumagim v. Bradshaw*, 39 Cal. 35; see § 4904, *ante*.

<sup>431</sup> *Bagley v. Eaton*, 8 Cal. 159; *Hill v. Smith*, 32 id. 166; *Hart v. Leavenworth*, 11 Mo. 629; *Dolsen v. Arnold*, 10 How. Pr. 528; *Heritage v. Hall*, 33 Barb. 347; *Smith v. Tiffany*, 36 id. 23; *Coddington v. Carnley*, 2 Hilt. 528; *State v. Elliott*, 15 Iowa, 72; *Edmiston v. Garrison*, 18 Wis. 594; *Gaines v. Forcheimer*, 9 Fla. 265; *Slocum v. Lurty*, Hempst. 431; *Zantzinger v. Weightman*, 2 Cranch C. C. 478; *Wilson v. Janes*, 3 Blatchf. 227.

<sup>432</sup> See *Treat v. Reilly*, 35 Cal. 129; *Kimball v. Gearhart*, 12 id. 27; *White v. Lezynsky*, 14 id. 167; *Bensley v. Atwill*, 12 id. 240; *Ritter v. Stock*, id. 402; *McGarrity v. Byington*, id. 432; *Visher v. Webster*, 13 id. 60; *Adams v. Pugh*, 7 id. 150; *Ritchie v. Bradshaw*, 5 id. 228; *Knowles v. Joost*, 13 id. 620; *Lewis v. Covillaud*, 21 id. 178; *Oullahan v. Starbuck*, id. 413; *Tebbs v. Weatherwax*, 23 id. 58; *Preston v. Keys*, id. 193; *Ellis v. Jeans*, 26 id. 275; *Wilcoxson v. Burton*, 27 id. 232; *Wilkinson v. Parrott*, 32 id. 102; *Newell v. Rusk*, 23 Ind. 210; *Oregon, etc., R. R. Co. v. Navigation Co.*, 3 Oreg. 178; *Carron v. Wood*, 10 Mont. 506; *Falk v. Brown*, 13 id. 125; *Sharp v. Hoffman*, 79 Cal. 404; *Ratton v. Patton*, 5 J. J. Marsh. 389; *United States v. Duval*, Gilp. 356; § 4882, *ante*.

sound, and unbiased exercise of judgment on the part of the jury, and that manifest injustice would result.<sup>433</sup> Where the court before which the case is tried is not satisfied with the verdict, and is convinced that it is clearly against the weight of evidence, it should grant a new trial, although there may be some conflict in the testimony.<sup>434</sup> And where there is a conflict and the trial court grants a new trial, it will be presumed on appeal that the court below was of opinion that the evidence preponderated against the verdict;<sup>435</sup> even though the judge who granted the new trial is different from the one who tried the case and did not hear the testimony.<sup>436</sup> If the verdict is against the weight of evidence, but there is still some evidence to justify it, a new trial will not be granted on appeal, for insufficiency of evidence to sustain the verdict.<sup>437</sup> But where there was evidence on both sides, it must clearly appear that the verdict was given by mistake or willful abuse of power;<sup>438</sup> but it should not go beyond that point to interfere with decision of fact fairly deducible from conflicting testimony.<sup>439</sup> In such case the verdict of a jury is decisive;<sup>440</sup> as in questions of fraud;<sup>441</sup> ques-

<sup>433</sup> McKay v. Thorington, 15 Iowa, 25; § 4920, *ante*.

<sup>434</sup> Dickey v. Davis, 39 Cal. 565; People v. Baker, *id.* 686; Hawkins v. Abbott, 40 *id.* 641; Bates v. Howard, 105 *id.* 173; Warner v. Cleaning Works, *id.* 409; Philpotts v. Blasdel, 8 Nev. 61.

<sup>435</sup> Mason v. Austin, 46 Cal. 387; Sherman v. Mitchell, *id.* 576; Treadway v. Wilder, 9 Nev. 67; Magaroll v. Mulligan, 11 *id.* 96; People v. Burt, 2 West Coast Rep. 721; Davis v. U. S. R. R. Co., *id.* 453; Johnson v. Hancock, 4 *id.* 418; Herzog v. Julien, 3 *id.* 525; Nelson v. Floyd, *id.* 144.

<sup>436</sup> Macy v. Davila, 48 Cal. 647; Altschul v. Doyle, *id.* 535; Rice v. Cunningham, 29 *id.* 492.

<sup>437</sup> Kille v. Tubbs, 32 Cal. 333; Rice v. Cunningham, 29 *id.* 492.

<sup>438</sup> Carr v. Gale, 3 Woodb. & M. 38; Fearing v. De Wolf, *id.* 185; Alken v. Bemis, *id.* 348; Whetmore v. Murdock, *id.* 380; Davison v. Sealskins, 2 Paine, 324; Stanley v. Whipple, 2 McLean, 35; to nearly the same effect: Blanchard's Gun Stock Turning Factory v. Jacobs, 2 Blatchf. 69; Baker v. The Potomac, 18 How. Pr. 185; Shaw v. Collier, *id.* 238; Walker v. Smith, 1 Wash. C. C. 202; People v. Forsythe, 2 West Coast Rep. 288; Winans v. Sierra Lumber Co., 4 *id.* 277; Harrington v. Chambers, 1 *id.* 63; Salisbury v. Brown, 3 *id.* 618; Jack v. Saunders, *id.* 480; Reynolds v. Scott, *id.* 291.

<sup>439</sup> Mathews v. Poultney, 33 Barb. 127; Smith v. Tiffany, 36 *id.* 23.

<sup>440</sup> Conklin v. Thompson, 29 Barb. 218; Best v. Starks, 24 How. Pr. 58; Sheldon v. Hudson River R. R. Co., 29 Barb. 226; Williams v. Vanderbilt, *id.* 491.

<sup>441</sup> 1 Gra. & Wat. New Trial, 353; Comfort v. Thompson, 10 Johns.

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tions of title to chattels;<sup>442</sup> or the genuineness of a signature;<sup>443</sup> or a question turning on the credibility of a witness.<sup>444</sup>

**§ 4921. Notice of settlement of statement.**

*Form No. 1155.*

[TITLE.]

A. B., Esq., attorney for plaintiff, John Doe:

Please take notice that the defendant's statement to be used on his motion for a new trial herein will be settled by the judge of this court on the ..... day of ....., 18.., at ..... o'clock, at his chambers, in the city hall in the city of ....., in the county of .....

**§ 4922. Amendments, how made.** If the proposed statement be not agreed to by the adverse party, he must within ten days thereafter prepare amendments thereto, and serve the same or a copy thereof upon the moving party. If the amendments be adopted, the statement shall be amended accordingly, and presented to the judge who heard or tried the cause, for settlement, or to the clerk of the court for the judge. If not adopted, the proposed statement and amendments shall within ten days thereafter be presented by the moving party to the judge upon five days' notice to the adverse party, or deliver to the clerk of the court for the judge, and settled as bills of exceptions. If the action was tried by a referee, the statement shall be settled as are bills of exceptions. If no amendments are served within time, or if served, are allowed, the statement and amendment, if any, may be presented for settlement without notice to the adverse party.<sup>445</sup>

**§ 4923. Amendments after settlement.** An amendment after settlement, adding no facts or exceptions, and not affecting the merits, and in furtherance of justice, is in the discretion of the court, and may be allowed.<sup>446</sup> Courts should be liberal in al-

101; *Jarvis v. Hatheway*, 3 *id.* 180; *People v. Townsend*, 37 *Barb.* 520.

<sup>442</sup> *Gardner v. Ryerson*, 19 *How. Pr.* 108.

<sup>443</sup> *Wright v. Carillo*, 22 *Cal.* 595.

<sup>444</sup> *United States v. Five Cases of Cloth*, 2 *N. Y. Leg. Obs.* 84.

<sup>445</sup> *Cal. Code Civ. Pro.*, § 659, subd. 3; see *ante*, § 4897.

<sup>446</sup> *Valentine v. Stewart*, 15 *Cal.* 387; affirmed in *Loucks v. Edmondson*, 18 *id.* 203; and see *Richardson v. City of Eureka*, 96 *id.* 443; § 4897, *ante*.

lowing amendments of this kind.<sup>447</sup> But otherwise a court should not entertain a motion to amend after it has been filed and served on the opposite party.<sup>448</sup> Nor, unless good reason be shown, receive an affidavit made after time has elapsed.<sup>449</sup> A statement agreed to should not be amended, unless under a very clear showing of mistake or fraud.<sup>450</sup>

§ 4924. **Certificate.** When settled, the statement shall be signed by the judge or referee, with his certificate to the effect that the same is allowed, and shall then be filed with the clerk.<sup>451</sup> Under the former Practice Act, the certificate of the attorneys for the respective parties that the statement had been agreed upon and was correct was also a mode of authentication.<sup>452</sup> And it has been held under the present California Code of Civil Procedure that the certificate of the judge or referee may be waived by stipulation, and if so waived, on the hearing of the motion, it can not be raised on appeal.<sup>453</sup> A certificate can not be added, nor additions made thereto after appeal taken.<sup>454</sup>

§ 4925. **Effect of notice.** If the notice of the time and place of the settlement of a statement is given to appellant, and he does not attend, he can not afterwards complain of the statement as settled.<sup>455</sup>

§ 4926. **Exclusion of useless matter.** It is the duty of the judge or referee, in settling the statement, to strike out of it all redundant and useless matter, and to make the statement

<sup>447</sup> *Caldwell v. Greeley*, 5 Nev. 263.

<sup>448</sup> *Levy v. Getelson*, 27 Cal. 685.

<sup>449</sup> *Howe v. Briggs*, 17 Cal. 385.

<sup>450</sup> *Hutchinson v. Bours*, 13 Cal. 52.

<sup>451</sup> Cal. Code Civ. Pro., § 659, subd. 3; see § 4899, *ante*; *Raymond v. Thexton*, 7 Mont. 299; *Scherrer v. Hale*, 9 id. 63. It is proper practice for the trial judge to refuse to sign a statement on a motion for a new trial when it is a mere copy of the stenographer's notes. *Sherman v. Higgins*, 7 Mont. 486.

<sup>452</sup> See *Godchaux v. Mulford*, 26 Cal. 316; 85 Am. Dec. 178; *Richardson v. City of Eureka*, 96 Cal. 443; *Pearce v. Boggs*, 99 id. 340.

<sup>453</sup> *Sarver v. Garcia*, 49 Cal. 218. See, as to the effect of a recital in the order of the court, *Millard v. Hathaway*, 27 Cal. 138. In *Vilhac v. Biven*, 28 Cal. 413, it was held that a statement without any certificate of its correctness could not be considered on appeal. See *post*, note "Statement, how authenticated."

<sup>454</sup> *Caples v. C. P. R. Co.*, 6 Nev. 265; *Lamburth v. Dalton*, 9 id. 64. As to presumptions in favor of judge's certificates, see *Overman S. Mining Co. v. American M. Co.*, 7 Nev. 312.

<sup>455</sup> *Vilhac v. Biven*, 28 Cal. 409; and see § 4897, *ante*.



truly represent the case, notwithstanding the assent of the parties to the redundant or useless matter, or to any inaccurate statement.<sup>456</sup> If the motion is heard upon the minutes of the court, and a statement be subsequently prepared for appeal, such statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them; and it shall be the duty of the judge to exclude all other evidence or matter from the statement.<sup>457</sup> The proper place to object to the insertion of immaterial matter is on the settlement of the statement.<sup>458</sup>

§ 4927. **Engrossment of statement.** The proper practice is to engross the statement as settled, and so much of the deeds and other documentary evidence as is directed to be inserted, with the authentication of the judge indorsed on the engrossed statement.<sup>459</sup> Where the refusal of the court to admit certain documentary evidence is relied upon as error, the record should contain either a copy of such documentary evidence or a settled abstract of its contents.<sup>460</sup> The engrossed statement must contain all that the parties rely on, set out in full as they wish it to be considered by the court.<sup>461</sup> Neither the notice of motion for new trial nor affidavits in support of it have properly any place in a statement on motion for a new trial.<sup>462</sup>

§ 4928. **Statement, how authenticated.** A statement not authenticated by certificate of the parties or the judge will not be regarded.<sup>463</sup> A statement signed by the judge, and appearing from the minutes of the court to have been used on the hearing of the motion, is sufficiently authenticated.<sup>464</sup> Agreeing to submit a motion, without the statement having been settled or authenticated, does not waive objection to want of authentication.<sup>465</sup> A refusal to strike out a proposed amendment is not an authentication and settlement of a statement;<sup>466</sup> nor is

<sup>456</sup> Cal. Code Civ. Pro., § 659, subd. 3.

<sup>457</sup> Id., § 661.

<sup>458</sup> Kimball v. Semple, 31 Cal. 657.

<sup>459</sup> Id.; Marlow v. Marsh, 9 Cal. 259.

<sup>460</sup> Doyle v. Franklin, 48 Cal. 537.

<sup>461</sup> Bush v. Taylor, 45 Cal. 112; see § 4895. *ante*.

<sup>462</sup> Ferrer v. Home Mutual Ins. Co., 47 Cal. 416.

<sup>463</sup> Vilhac v. Biven, 28 Cal. 409; Cosgrove v. Johnson, 30 id. 509.

<sup>464</sup> Kidd v. Laird, 15 Cal. 161; 76 Am. Dec. 472.

<sup>465</sup> Cosgrove v. Johnson, 30 Cal. 509.

<sup>466</sup> Id.



an indorsement by the judge at the bottom of the settlement that the amendments were allowed.<sup>467</sup> Where the record shows simply a statement signed by the judge, without any certificate preceding as to the correctness of the statement, it is insufficient.<sup>468</sup> Unless a statement be agreed to by counsel or settled by the judge, it has not sufficient authentication to constitute any portion of the record.<sup>469</sup> Where a statement is not authenticated in the mode prescribed by statute, it is a good ground for denying a new trial.<sup>470</sup>

§ 4929. **Settlement, when made.** Such statements should be settled by the judge and certified by him before the motion is decided;<sup>471</sup> unless the motion be made upon the minutes of the court.<sup>472</sup> But it need not be shown affirmatively that the settlement was upon proper notice, or in the presence of both parties.<sup>473</sup>

§ 4930. **Motion — hearing.** Under the Code system, from the entry of the verdict or filing of the findings of the court, the motion for a new trial is a kind of episode, or in a certain sense a collateral proceeding, a proceeding not in the direct line of the judgment, for the judgment may be at once entered and even executed, while the motion for new trial ends in an order reviewable on an independent appeal.<sup>474</sup> The motion for a new trial must be made promptly, but especially if based upon the ground of surprise.<sup>475</sup> The application for a new trial shall be heard at the earliest practicable period after notice of the motion, if the motion is to be heard upon the minutes of the court;

<sup>467</sup> *Baldwin v. Ferre*, 23 Cal. 461.

<sup>468</sup> *McCartney v. Fitz Henry*, 16 Cal. 184.

<sup>469</sup> *Doyle v. Seawall*, 12 Cal. 425; *Paige v. O'Neal*, id. 492.

<sup>470</sup> *White v. White*, 6 Nev. 20.

<sup>471</sup> *Waggenheim v. Hook*, 35 Cal. 216.

<sup>472</sup> Cal. Code Civ. Pro., § 661.

<sup>473</sup> *Battersby v. Abbott*, 9 Cal. 565. The method of making and settling statements commented on. *Levey v. Fargo*, 1 Nev. 416; *Arnold v. Sinclair*, 12 Mont. 248; *Montana, etc., Co. v. Howard*, 10 id. 298. Under Montana practice, a statement on motion for a new trial may be settled and passed upon by the successor of the judge who tried the case. *Territory v. Bryson*, 9 Mont. 32; and see *Cummings v. Conlan*, 66 Cal. 403.

<sup>474</sup> *Spanagel v. Dellinger*, 38 Cal. 284; *Benedict v. Caffé*, 3 Duer, 669.

<sup>475</sup> *Peck v. Hiler*, 30 Barb. 655; *Rapelye v. Prince*, 4 Hill, 119; and see § 4882, *ante*.

and in other cases, after the affidavits, bill of exceptions, or statement, as the case may be, are filed, and may be brought to a hearing upon motion of either party.<sup>476</sup> If a motion for a new trial is not prosecuted with due diligence, it should be dismissed on application,<sup>477</sup> as a failure to prosecute is an abandonment of the motion.<sup>478</sup> The question of delay held to be in the discretion of the court below, which will not be interfered with unless abuse of discretion clearly appears.<sup>479</sup> And where it does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the verdict.<sup>480</sup> If the judge who tried a cause goes to the county in his district not adjoining the one in which the case was tried, to hold court, before the time for filing amendments to the statement on motion for a new trial has expired, the moving party prosecutes the motion with due diligence if he brings the same to a hearing when the judge returns, or first holds court in a county adjoining the one in which the case was tried.<sup>481</sup>

<sup>476</sup> Cal. Code Civ. Pro., § 660; Stat. Nev., § 198.

<sup>477</sup> Frank v. Doane and Green v. Doane, 15 Cal. 302; Eckstein v. Calderwood, 27 id. 413; see Warden v. Mendocino Co., 32 id. 655; Ward v. Patterson, 46 Penn. St. 372.

<sup>478</sup> Mahoney v. Wilson, 15 Cal. 42; but see Griffith v. Gruner, 47 id. 645.

<sup>479</sup> Boggs v. Clark, 37 Cal. 237; Chabot v. Tucker, 39 id. 435; Hopkins v. W. P. R. R. Co., 44 id. 389. *Time to move for new trial.*— See § 4886, *ante*; also Sullivan v. City of Helena, 10 Mont. 134; Clark v. Perry, 17 Col. 56; Gray v. Winder, 77 Cal. 525. The question of want of diligence in prosecuting a motion for new trial is one resting in the sound discretion of the court trying the motion, and in the absence of anything showing that the court did not exercise a sound discretion, the action of the trial court concerning the question of diligence will not be disturbed. Burlock v. Shupe, 5 Utah, 428. No proceedings for a new trial can be had until after the trial is completed, and a final decision is reached by the court or jury. In an equity case, the verdict of a jury upon special issues is merely advisory to the court, and the time within which notice of intention to move for a new trial must be served does not begin to run until the court has adopted or rejected the findings of the jury. Bell v. Marsh, 80 Cal. 411; Warring v. Freear, 64 id. 54. A notice of intention to move for a new trial can not be stricken out for want of diligence in prosecuting the motion. Hellbron v. Heinlen, 70 Cal. 482.

<sup>480</sup> Myers v. Casey, 14 Cal. 542.

<sup>481</sup> Warden v. Mendocino Co., 32 Cal. 655; Simmons v. Goin, 45 id. 669. Under the present California Code of Civil Procedure, and

§ 4931. **Argument on motion.** On the hearing reference may be had, in all cases, to the pleadings and orders of the court on file, and when the motion is made on the minutes, reference may also be had to any depositions, documentary evidence, and phonographic report of the testimony on file.<sup>482</sup> The motion can only be heard on the record made and settled before the motion is made;<sup>483</sup> except when made on the minutes of the court. After notice of intention, defendants may, at their option, move or not move for a new trial, and if they choose may abandon their proceedings.<sup>484</sup> But if the statement sets forth the grounds of the motion, and the motion is made and submitted, a refusal to argue the motion is not an abandonment of the same.<sup>485</sup>

§ 4932. **Denial of motion.** An order dismissing a motion for a new trial is in effect denying a new trial.<sup>486</sup> Where parties stipulate that a motion be denied, they can not question the correctness of an order denying the same.<sup>487</sup> No "exception" lies to overruling a motion for a new trial, nor for entering judgment.<sup>488</sup>

particularly section 660, it would seem that a notice of the hearing of the motion would be the proper practice after the statement, bill of exceptions, or affidavits are filed.

<sup>482</sup> Cal. Code Civ. Pro., § 660; *Weatherbee v. Carroll*, 33 Cal. 549; *Bode v. Lee*, 102 id. 586; *Railroad Co. v. Superior Court*, 105 id. 84. As a rule, affidavits only are used upon a motion for a new trial, but oral testimony is also admissible. *Schoolfield v. Brunton*, 20 Col. 139; *Gans v. Wells*, 36 Kan. 688. Any errors in law occurring at the trial must be presented in a bill of exceptions or statement of the case, and can not be considered if presented merely in *ex parte* affidavits containing the evidence which was presented at the trial and the rulings thereon. *Pavement Co. v. Bowie*, 104 Cal. 286.

<sup>483</sup> *Cosgrove v. Johnson*, 30 Cal. 509; *Quivey v. Gambert*, 32 id. 304. The motion for a new trial is to be heard upon an independent record, distinct from the record upon which the judgment depends. *Bode v. Lee*, 102 Cal. 583.

<sup>484</sup> *Stoyell v. Cole*, 19 Cal. 602.

<sup>485</sup> *Oarder v. Baxter*, 28 Cal. 99.

<sup>486</sup> *Warden v. Mendocino Co.*, 32 Cal. 655. Where the condition imposed in an order granting a new trial is not complied with the motion for a new trial must be regarded as having been denied. *Yaroutte v. Haley*, 104 Cal. 497.

<sup>487</sup> *Brotherton v. Hart*, 11 Cal. 405.

<sup>488</sup> *Pomeroy v. Bank of Ind.*, 1 Wall. 592. By Cal. Code Civ. Pro., § 647, it is deemed to have been excepted to.

§ 4933. **Effect of motion.** A motion for a new trial filed within the time allowed by law, preserves all rights till it can be heard and determined, and is not affected by the adjournment of the court for the term.<sup>489</sup> But a motion for a new trial does not stay proceedings on the judgment;<sup>490</sup> nor does it operate as a suspension of an injunction.<sup>491</sup> If, after a court has filed its findings of facts, the case is sent to a referee to take an account, the motion does not stay the proceedings pending before the referee.<sup>492</sup> Nor does the pendency of a motion for new trial stay proceedings so as to deprive the court of the power of vacating an order appointing a receiver made before the trial.<sup>493</sup> The motion is not equivalent to a new action.<sup>494</sup> An order granting a new trial is final, and the court can not afterwards vacate it and decide again on the motion.<sup>495</sup> It vacates the judgment, if any, entered on the verdict or findings set aside, and for that reason an appeal from the judgment can not be entertained.<sup>496</sup>

§ 4934. **Hearing on motion.** The fact that instructions given by the court are lost or mislaid before a motion for a new trial is heard is no ground to suspend the hearing of the motion.<sup>497</sup> It is irregular for the court to reverse its first judgment, and render

<sup>489</sup> *Lurvey v. Wells, Fargo & Co.*, 4 Cal. 106; see *Copper Hill M. Co. v. Spencer*, 25 id. 16.

<sup>490</sup> *People v. Loucks*, 28 Cal. 38.

<sup>491</sup> *Ortman v. Dixon*, 9 Cal. 23.

<sup>492</sup> *Crowther v. Rowlandson*, 27 Cal. 376.

<sup>493</sup> *Copper Hill M. Co. v. Spencer* (No. 1), 25 Cal. 11. As to effect of motion for a new trial in particular cases, see the following: *United States v. Hodge*, 6 How. (U. S.) 279; *Clark v. Manuf. Ins. Co.*, 2 Woodb. & M. 472; *Brent v. Coyle*, 2 Cranch C. C. 348; *Fraser v. Weller*, 6 McLean, 11; *Clark v. Sohler*, 1 Woodb. & M. 368.

<sup>494</sup> *United States v. Hawkins' Heirs, etc.*, 10 Pet. 125. The hearing and disposition of a motion for a new trial is within the meaning of section 398, California Code of Civil Procedure, providing for change of place of trial, on the ground of the disqualification of the judge before whom the case is pending. *Finn v. Spagnoli*, 67 Cal. 330.

<sup>495</sup> *Coombs v. Hibberd*, 43 Cal. 452.

<sup>496</sup> *Kower v. Gluck*, 33 Cal. 407; *Wheeler v. Kassabaum*, 76 id. 90; and see *Savings Bank v. Deuprey*, 66 id. 168; *Dorland v. Cunningham*, id. 484; *Lang v. Superior Court*, 71 id. 491.

<sup>497</sup> *Visher v. Webster*, 13 Cal. 58.

a contrary one, without hearing or notice.<sup>498</sup> The motion should not be decided before the statement has been settled, engrossed, and certified;<sup>499</sup> nor even then without notice to either party or any actual submission of the motion.<sup>500</sup> And where a new trial was prematurely made through inadvertence, held that the order should have been vacated.<sup>501</sup> The proper place to raise the objection that the statement was not filed in time is in the trial court; it can not be raised for the first time on appeal.<sup>502</sup>

§ 4935. **Motion, when made.** In proceedings on motion for a new trial, there is no term.<sup>503</sup> The motion may be made before or after entry of judgment, and may be made at the term or out of the term.<sup>504</sup> But the court has no power to set aside an order denying a new trial after the adjournment of the term.<sup>505</sup> The motion may be heard at chambers.<sup>506</sup> When the judge who tried the cause resides in another county in the same district, it may by consent of parties be heard by such judge at chambers, or in open court in the county of his residence, or in any

<sup>498</sup> *Mitchell v. Hackett*, 14 Cal. 661.

<sup>499</sup> *Morris v. De Oellis*, 41 Cal. 331; see, also, *First Nat. Bank v. McAndrews*, 5 Mont. 251; *Faut v. Tandy*, 7 id. 443; *Brown v. Board of Commissioners*, 15 id. 244. Upon the hearing of the motion the trial court is limited in its consideration to the matters contained in the statement, and is not at liberty to go outside of the statement for the purpose of determining whether the new trial should be granted or refused. *Cole v. Wilcox*, 99 Cal. 549. The court can not go beyond the grounds on which a new trial was asked. *Alpers v. Hunt*, 86 Cal. 78. It is the duty of the trial court to examine the evidence, although it be conflicting, and if dissatisfied with the conclusions reached, to grant a new trial. And the rule is the same whether the motion is heard by the judge who tried the case, or by some other judge, where only knowledge of the facts is obtained from the records. *Jones v. Sanders*, 103 Cal. 678; *Wilson v. Railroad Co.*, 94 id. 166; *Curtiss v. Starr*, 85 id. 376.

<sup>500</sup> *De Gaze v. Lynch*, 42 Cal. 362.

<sup>501</sup> *Hall v. Polack*, 42 Cal. 218.

<sup>502</sup> *Twist v. Kelly*, 11 Nev. 377.

<sup>503</sup> *Spanagel v. Dellinger*, 34 Cal. 476.

<sup>504</sup> Id.; see *Snider v. Rinehart*, 18 Col. 18. Motions for new trial and in arrest of judgment being made and acted on the same day, it will be presumed that they were in proper order. *Water, etc., Co. v. Gildersleeve*, 4 N. Mex. 171.

<sup>505</sup> *Wilson v. McEvoy*, 25 Cal. 169; *Hegeler v. Henckell*, 27 id. 491.

<sup>506</sup> Cal. Code Civ. Pro., § 166.

other county.<sup>507</sup> A motion for a new trial should not be made while proceedings are pending before a referee.<sup>508</sup>

§ 4936. **Pendency of motion.** And if motion be taken under advisement, the court may, in term time or vacation, order judgment on a verdict rendered and recorded.<sup>509</sup> But if pending a motion for a new trial taken under advisement for decision in vacation, and a new term intervenes, it is a continuance of the motion, and the court may act on it at its convenience.<sup>510</sup> If the statement on motion for a new trial is not filed in time, an order granting a new trial for causes appearing in such statement only will be reversed.<sup>511</sup> If no motion is made for a new trial in the court below, the findings of the court and the verdict of the jury are conclusive of the facts.<sup>512</sup> The provisions of the Practice Act in relation to motion for new trials have no application to a motion to set aside the report of the commissioners in a proceeding to condemn lands for railroad purposes; and such motion may be properly founded on the report itself, of which the testimony taken by the commissioners properly forms a part.<sup>513</sup> The award in such cases will not be set aside when there is a substantial conflict in the testimony.<sup>514</sup>

§ 4937. **Parties to motion.** One of several parties against whom a judgment is rendered, who does not join in the motion for a new trial, can not complain of alleged error in denying a new trial.<sup>515</sup> If some of the parties against whom the order denying a new trial is rendered do not appeal therefrom, those that appeal must serve on them a notice of appeal, otherwise the Supreme Court will refuse to entertain the appeal.<sup>516</sup>

§ 4937a. **New trial — modification of judgment.** If upon the hearing of the defendant's motion for a new trial, the court de-

<sup>507</sup> Cal. Code Civ. Pro., § 663.

<sup>508</sup> *Crowther v. Rowlandson*, 27 Cal. 376.

<sup>509</sup> *Hutchinson v. Bours*, 13 Cal. 50.

<sup>510</sup> *Id.*; *Sheppard v. Wilson*, 6 How. (U. S.) 260.

<sup>511</sup> *Hegeler v. Henckell*, 27 Cal. 491; and see § 4930, *ante*.

<sup>512</sup> *Allen v. Fennon*, 27 Cal. 68.

<sup>513</sup> *W. P. R. R. Co. v. Reed*, 35 Cal. 621.

<sup>514</sup> *Id.*

<sup>515</sup> *Calderwood v. Brooks*, 28 Cal. 151.

<sup>516</sup> *People v. Center*, 61 Cal. 191. New trial as to one defendant. See *Dawson v. Schloss*, 93 Cal. 194; *Wittenbrock v. Bellmer*, 57 *id.* 12.

cides that the judgment for the plaintiff is too great, it is not proper procedure to order it modified upon consent of the plaintiff, but the court should cause the plaintiff to enter a *remittitur* of the excess when denying the new trial.<sup>517</sup>

§ 4937b. **The same — res adjudicata.** The doctrine of *res adjudicata* applies to the decision of a motion for a new trial, and after the motion has been denied the moving party is not at liberty to make a second motion therefor.<sup>518</sup>

§ 4937c. **The same — in Supreme Court.** A motion for a new trial of a proceeding originally commenced in the Supreme Court will be entertained under section 988, Utah Code of Civil Procedure.<sup>519</sup>

§ 4937d. **The same — motion for in federal courts.** A motion for a new trial in the federal courts is a motion addressed to the discretion of the court, and the decision of the court, in granting or refusing it, alone is not the proper subject of a bill of exceptions.<sup>520</sup>

§ 4937e. **The same — as to part of issues.** Where the issues are separable, the losing party may move for a new trial as to a part, leaving the findings to stand as to the remainder.<sup>521</sup> But in granting a new trial *pro tanto* as to certain particular issues only, the trial court should with great certainty recite the issues in terms upon which the new trial is to be had. And the practice of granting a new trial as to the issues covered by certain numbered findings is condemned as bad.<sup>522</sup>

§ 4937f. **The same — bill of exceptions — ambiguity.** When the specifications in a bill of exceptions used on a motion for new trial include a double statement that the evidence is insufficient to justify the decision, and that the decision is against law in the particulars specified, the ambiguity is removed where the particulars stated show that the objection is to the insufficiency of the evidence.<sup>523</sup>

<sup>517</sup> *Chalmers v. Chalmers*, 81 Cal. 81; see § 4909, *ante*.

<sup>518</sup> *Egan v Egan*, 90 Cal. 15; and see § 4850, *ante*.

<sup>519</sup> *People v. Splers*, 4 Utah, 385.

<sup>520</sup> *Barr v. Gratz*, 4 Wheat. 213; *Coleman v. Bell*, 4 N. Mex. 46; see § 4901, *ante*.

<sup>521</sup> *San Diego Land, etc., Co. v. Neale*, 78 Cal. 63; *Duff v. Duff*, 101 id. 1; and see § 4850, *ante*.

<sup>522</sup> *Mountain Tunnel, etc., Min. Co. v. Bryan*, 111 Cal. 36.

<sup>523</sup> *Combination Land Co. v. Morgan*, 95 Cal. 548.



§ 4937g. **The same — striking statement from files.** A statement on motion for a new trial will not be stricken from the record upon the alleged ground that it was not presented to the judge who tried the case, or delivered to the clerk for the judge to settle and sign within ten days after service of the proposed amendments, where it appeared that after the statement and amendments thereto were filed, both were presented to the judge and settled in the presence of respective counsel.<sup>524</sup> Nor will such statement be disregarded because amendments thereto are not engrossed in the record, but occupy a separate position at the close of the statement, where such amendments comprise additional matter which is complete and intelligible in itself.<sup>525</sup> Under Colorado practice, a motion for a new trial at a subsequent term without an order extending time, will not be considered, and may be stricken from the files.<sup>526</sup> Where a statement on motion for a new trial is stricken from the files, the motion for a new trial is properly denied.<sup>527</sup>

§ 4937h. **Review of new trial order — in general.** When an order granting a new trial has been made upon some legal proposition, which may be considered in itself, a stronger showing is required to justify the appellate court in interfering with it than with an order refusing a new trial.<sup>528</sup> If the order granting a new trial is silent as to the ground on which it was made, and the existence of a valid ground is shown by the record, the appellate court will presume that the order was made on that ground.<sup>529</sup> If the record fails to show upon what ground the motion for a new trial was granted, and the evidence is conflicting, it will be presumed that the motion was granted upon the ground of the insufficiency of the evidence to support the verdict.<sup>530</sup> When all the evidence offered on the hearing of the

<sup>524</sup> Sell v. Graves, 14 Mont. 341.

<sup>525</sup> Penn Placer Min. Co. v. Schreiner, 14 Mont. 121; and see Doyle v. Gore, 13 id. 471.

<sup>526</sup> Clark v. Perry, 17 Col. 56; Mining Co. v. Englebach, 18 id. 106.

<sup>527</sup> Sutton v. Symons, 100 Cal. 576.

<sup>528</sup> Mehan v. Railroad Co., 55 Iowa, 306; Cooney v. Furlong, 66 Cal. 520.

<sup>529</sup> Curtiss v. Starr, 85 Cal. 376; and see People v. Lum Yit, 83 id. 130; Bank v. Hitchcock, 76 id. 489.

<sup>530</sup> Reclamation Co. v. Cunningham, 71 Cal. 221; Irving v. Cunningham, 58 id. 306; and see Minturn v. Bliss, 77 id. 90; White v. Merrill, 82 id. 14.



motion is not before the appellate court, the finding of the court below will be accepted as correct.<sup>531</sup> If the statement is certified by the trial judge to be correct, an objection upon appeal that the statement does not contain all the evidence is without merit.<sup>532</sup> Upon an appeal from an order denying a new trial, questions relating to the sufficiency of the complaint can not be reviewed or considered by the appellate court.<sup>533</sup> Nor does such an appeal involve a review of the judgment, the correctness of which can be determined only by an appeal therefrom.<sup>534</sup> Nor has the appellate court jurisdiction to revise the proceedings of the trial court in settling statements of cases.<sup>535</sup> But it is held that the appellate court has power to review anything that the lower court passed upon in deciding the motion for a new trial;<sup>536</sup> but will consider no matters not made the basis of such motion.<sup>537</sup> Affidavits used on such motion will not be considered by the reviewing court unless brought into the record by a statement or bill of exceptions;<sup>538</sup> nor unless identified as having been used on the motion.<sup>539</sup> Where the bill of exceptions does not contain all of the evidence, the appellate court will not review the action of the lower court in overruling a motion for a new trial because the verdict is not sustained by the evidence.<sup>540</sup>

§ 4937i. **The same — affirmation of order granting or denying.** An order granting a new trial will be affirmed, if it can be justified on any of the grounds upon which the motion for a new trial was based, without regard to the reasons for the order expressed in the opinion of the judge.<sup>541</sup> Such order will be affirmed if upon the whole record it appears that a new trial

<sup>531</sup> *Schoolfield v. Brunton*, 20 Col. 139.

<sup>532</sup> *Richardson v. Eureka*, 96 Cal. 443.

<sup>533</sup> *Evans v. Paige*, 102 Cal. 132.

<sup>534</sup> *Bode v. Lee*, 102 Cal. 583.

<sup>535</sup> *Cox v. Delmas*, 92 Cal. 652; *Hyde v. Boyle*, 86 id. 352.

<sup>536</sup> *Needham v. Salt Lake City*, 7 Utah, 319; and see *McLaughlin v. Doherty*, 54 Cal. 519.

<sup>537</sup> *Wyoming Loan, etc., Co. v. Holliday Co.*, 3 Wyo. 386; *Rhodes v. Mummery*, 48 Ind. 216.

<sup>538</sup> *People v. Callaghan*, 4 Utah, 49.

<sup>539</sup> *Bagnall v. Roach*, 76 Cal. 106; see § 4867, *ante*.

<sup>540</sup> *Wood v. Farnham*, 1 Okl. 375; *Railroad Co. v. Henley*, 88 Ind. 535.

<sup>541</sup> *Nally v. McDonald*, 77 Cal. 284; *People v. Flood*, 102 id. 330; *Mills v. Oregon, etc., Nav. Co.*, id. 357.

should be had;<sup>542</sup> or if there is any theory upon which the action of the lower court in granting the order can be sustained.<sup>543</sup> An order denying a new trial will be affirmed, if any sufficient ground appears for the denial of the motion.<sup>544</sup> And when the findings of fact in favor of the plaintiff upon all the issues support the judgment, and no particular in which any one of them is not justified by the evidence is specified in the bill of exceptions upon which the motion for a new trial was made, the order denying a new trial will be affirmed.<sup>545</sup>

§ 4937j. **The same — reversal of order granting.** An order granting a new trial will be reversed as readily as an order refusing it, when it is granted solely through a misapprehension of law.<sup>546</sup> When undenied averments of the complaint and findings not excepted to render the ground upon which a new trial was granted immaterial, and it can be justified upon no other ground, the order granting the new trial will be reversed.<sup>547</sup> But an order granting a new trial on the ground of errors which occurred during the trial will not be reversed on appeal, if it appears that any errors prejudicial to the respondent were committed on the trial.<sup>548</sup> An order of the court dismissing the proceedings on a motion for a new trial can not be set aside on an *ex parte* application.<sup>549</sup>

<sup>542</sup> *Noyes v. Wood*, 102 Cal. 389.

<sup>543</sup> *Trumbull v. Jackman*, 9 Wash. St. 524; and see *Wormouth v. Gardner*, 105 Cal. 149; *Gross v. Kelleher*, 80 id. 519; *Townsend v. Briggs*, 88 id. 230; *Haggin v. Salle*, 14 Mont. 79.

<sup>544</sup> *Gray v. Winder*, 77 Cal. 525.

<sup>545</sup> *Baird v. Peall*, 92 Cal. 235.

<sup>546</sup> *Schramm v. South. Pac. Co.*, 87 Cal. 425.

<sup>547</sup> *Hayes v. Fine*, 91 Cal. 391.

<sup>548</sup> *In re Crozier*, 74 Cal. 180; *McCarthy v. Loupe*, 62 id. 300.

<sup>549</sup> *Greehn v. Marker*, 67 Cal. 364.

## PART TWELFTH

# APPEALS.

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### CHAPTER I.

#### APPEALS TO THE SUPREME COURT OF THE UNITED STATES.

§ 4938. **In general.** All courts having the power to revise and control the judgments and proceedings of inferior courts are technically denominated "appellate courts." The mode in which this supervisory power is invoked and exercised is not confined, however, to what is strictly called an "appeal." An appeal is a process of civil-law origin, and removes a cause entirely, subjecting the fact as well as the law to a review and revisal; but a writ of error is of common-law origin, and removes nothing for re-examination but the law.<sup>1</sup> Where no

<sup>1</sup> *Wiscart v. Dauchy*, 3 Dall. 321; compare *The San Pedro*, 2 Wheat. 182; *United States v. Wouson*, 1 Gall. 512; *United States v. Goodwin*, 7 Cranch, 108. *Right of appeal.* — An appeal in law is the removal of a matter or cause from an inferior to a superior court for the purpose of reviewing, correcting or reversing the judgment or sentence of the inferior tribunal. *Leach v. Blakely*, 34 Vt. 136. Appeals are wholly statutory and are given only by virtue of statutory law, and there must be a substantial compliance with the statute in order to confer jurisdiction upon the appellate court. *Benson v. Anderson*, 9 Utah, 154; *In re Bauer*, 112 Mo. 231; *State v. Black*, 15 Mont. 143; *Clelland v. Tanner*, 8 Col. 252; *Irrigation Co. v. Schone*, 2 S. Dak. 344; *Burbank v. Rivers*, 20 Nev. 81. Neither joinder in error nor the consent of parties can confer jurisdiction by appeal. *Gordon v. Gray*, 19 Col. 167; *Harvey v. Insurance Co.*, 18 Id. 354. The right of appeal is, however, remedial in its character, and in doubtful cases the right should always be granted. *Quint v. McMullen*, 103 Cal. 381. When a party perfects an appeal and then abandons it, his right of appeal is exhausted, the power of the subject is *functus officio*, and can not be exercised the second time. *Brill v. Meek*, 20 Mo. 358; *Schmeer v. Schmeer*, 16 Oreg. 243. The remedy by appeal may be modified or changed by law, there being no vested right in an appeal. *Schuster v. Weiss*, 114 Mo. 158; and see *Wintermute v. Carner*, 8 Wash. St. 585.

appeal is allowed by law, the proper method to take a case to an appellate court is by writ of error.<sup>2</sup> An appeal is allowed from the United States Circuit Courts, and District Courts acting as Circuit Courts, to the Supreme Court of the United States, in cases of equity, and of admiralty, and maritime jurisdiction, where the matter in dispute exceeds the sum or value of five thousand dollars exclusive of costs.<sup>3</sup> An appeal will also lie from a final decree in equity, without regard to the amount in dispute, in any case touching patent rights or copyrights; in actions for the enforcement of any revenue law; in actions against revenue officers; in cases on account of deprivation of rights of citizens, or under the Constitution; and in suits for injuries by conspirators against civil rights.<sup>4</sup> Final judgments at law in the same matters, or class of cases, may be reviewed upon writ of error. Cases tried by the Circuit Court without the intervention of a jury, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal, and when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment.<sup>5</sup>

The only mode in which the Supreme Court of the United States can review a final judgment or decree of a state court is upon writ of error, and such review is confined to cases enumerated in section 709, United States Revised Statutes. This section is as follows: "A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title,

<sup>2</sup> *Middleton v. Gould*, 5 Cal. 190; *Haight v. Gay*, 8 id. 297; 68 Am. Dec. 323.

<sup>3</sup> U. S. R. S., § 692; 18 U. S. Stat. at Large, 316.

<sup>4</sup> Id., § 699.

<sup>5</sup> Id., § 700; see *Supervisors v. Kennicott*, 103 U. S. 554. Writs of error and appeals from territorial courts are provided for by sections 702-704. The procedure on error and appeal is provided for by section 997 *et seq.* See *Bonfield v. Price*, 154 U. S. 671.

right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such state court, and may at their discretion award execution, or remand the same to the court from which it was removed by the writ." The true test as to whether a writ of error lies to the Supreme Court of the United States, from the final judgment of a state court, is to be arrived at, not from mere averment in the pleadings, but from the matter decided, as developed in the whole record.<sup>6</sup>

§ 4939. **Procedure on error.** "There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party."<sup>7</sup> The writ of

<sup>6</sup> Greely v. Townsend, 25 Cal. 614. *Writ of error—nature of.*—A writ of error is not in the nature of a writ of review, but is a new and original suit, in which original process is issued, which must be served upon the defendants in error, and which can only affect parties or strangers from the service of the citation. Taylor v. Boyd, 3 Ohio, 354; 17 Am. Dec. 603; Widber v. Superior Court, 94 Cal. 430. In Colorado, the writ is a constitutional writ of right from the Supreme Court to every final judgment of the County Court, and, though subject to reasonable regulation, it can not be abolished as to such judgments, nor can its scope or office be materially impaired while the constitutional provision guaranteeing it remains. Martin v. Simpkins, 20 Col. 438. It is not the office of the writ to relieve a party from his own mistake or omissions in the lower court. And a review by the Supreme Court upon writ of error must be prosecuted upon matters appearing in the record, and not upon *ex parte* matters introduced afterwards. German Nat. Bank v. Elwood, 16 Col. 244. The Supreme Court can not review by writ of error proceedings had subsequent to final judgment. Cross v. Moffat, 11 Col. 210; Polk v. Butterfield, 9 id. 325. Dismissal of writ of error. See Mowbray v. Denver, etc., R. R. Co., 2 Col. App. 128; Perkins v. Hoyt, 3 Wyo. 55.

<sup>7</sup> U. S. R. S., § 907.

error may be issued as well by the clerks of the Circuit Courts, under the seal of that court, as by the clerk of the United States Supreme Court; and must be, as nearly as each case will admit, agreeable to the form of a writ of error transmitted by the clerk of the Supreme Court to the clerks of the several Circuit Courts.<sup>8</sup> The record required to be attached to the writ of error is the record of the state Supreme Court in the cause, being the statement upon which the appeal was taken, with the other matters composing the transcript, together with the judgment of the Supreme Court, and also a copy of the opinion or opinions filed in the case.<sup>9</sup> No formal application for the writ is necessary, as it issues as a matter of course. The party desiring the review is denominated the plaintiff in error, and the opposite party the defendant in error. When the writ is issued by the Supreme Court of the United States to a state court, the citation to the defendant in error shall be signed by the chief justice, or judge, or chancellor of such court rendering the judgment or passing the decree complained of, or by a justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice.<sup>10</sup> Such writs of error shall be issued in the same manner and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States.<sup>11</sup> The judge or justice signing the citation shall, except in cases brought up by the United States or by direction of any department of the government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and if he fail to make his plea good, shall answer all damages and costs, where the writ is a *supersedeas* and stays execution, or all costs only where it is not a *supersedeas*.<sup>12</sup> The clerk of the Supreme Court of the United States secures the printing of the record, and charges the parties for a manuscript copy for the printer; and to secure this expense, and his fees in the case, shall require of the plaintiff in error a bond in the

<sup>8</sup> R. S. U. S., § 1004.

<sup>9</sup> See rule 8, U. S. Sup. Ct., subd. 2. When the writ shall be returned. Id., subd. 5. As to docketing case, etc., See U. S. Sup. Ct., rule 9, subd. 1.

<sup>10</sup> U. S. R. S., § 999.

<sup>11</sup> Id., § 1003.

<sup>12</sup> Id., § 1000; see U. S. Sup. Ct. rule 29; *Haskins v. Railroad Co.*, 109 U. S. 107.

penalty of two hundred dollars, or a deposit of that amount to be placed in bank subject to his draft.<sup>13</sup>

The writ of error must be brought within two years after the entry of the judgment or decree, except where the party entitled to prosecute the writ is an infant, insane person, or imprisoned, in which cases the two years is exclusive of the period of such disability.<sup>14</sup> There shall be no reversal upon a writ of error for error in ruling upon any plea in abatement other than a plea to the jurisdiction of the court, or for any error in fact.<sup>15</sup> Where both parties appeal but one record is required.<sup>16</sup> The Supreme Court of the United States has no jurisdiction of a case brought up upon an agreed statement of facts without writ of error or appeal.<sup>17</sup> And the appeal on writ of error must be prosecuted at the next succeeding term.<sup>18</sup> It has no jurisdiction of an appeal unless the transcript of the record is filed at the next term after the appeal is obtained, though the transcript is filed at the next term after the appeal bond is given, and though the citation recites that the appeal was allowed at the term at which the appeal bond is given.<sup>19</sup> Amount of judgment is not material on review of decision in the state courts against rights claimed under the laws and treaties of the United States;<sup>20</sup> as in actions under the Revenue Laws.<sup>21</sup>

§ 4940. Form of bond.

*Form No. 1156.*

SUPREME COURT OF THE UNITED STATES.

<p>A. B., Plaintiff in Error,  <i>against</i>  C. D., Defendant in Error.</p>	}
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Know all men by these presents, that we, A. B., E. F., and G. H., of ....., are held and firmly bound unto the said C. D., of ....., in the sum of ..... dol-

<sup>13</sup> See rule 10, U. S. Sup. Ct.

<sup>14</sup> U. S. R. S., § 1003; see *Cummings v. Jones*, 104 U. S. 419.

<sup>15</sup> *Id.*, § 1011.

<sup>16</sup> *Id.*, § 1013.

<sup>17</sup> *Washington Co. v. Durant*, 7 Wall. 694; *Denhurst v. Coulthard*, 8 Dall. 409.

<sup>18</sup> *Castro v. United States*, 3 Wall. 46.

<sup>19</sup> *Id.*; *Edmonson v. Bloomshire*, 7 Wall. 306.

<sup>20</sup> *Buel v. Van Ness*, 8 Wheat. 312.

<sup>21</sup> *United States v. Bromley*, 12 How. (U. S.) 88.

lars, lawful money of the United States, to be paid to the said C. D., his executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this ..... day of ....., 189..

Whereas, the above-named A. B. hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the Supreme Court of the state of California in a certain action, wherein said C. D. was plaintiff, and said A. B. was defendant [or as the case may be].

Now, therefore, the condition of this obligation is such, that if the above-named A. B. shall prosecute his said writ of error to effect, and answer all costs [or, if a *supersedeas* is desired, costs and damages], if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue

Sealed and delivered }  
in presence of }

A. B. [SEAL.]  
E. F. [SEAL.]  
G. H. [SEAL.]

§ 4941. Citation.

*Form No. 1157.*

UNITED STATES OF AMERICA — ss.:

To C. D., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on [the second Monday of October next], pursuant to a writ of error sued out of said court to the [Supreme Court of the state of California], wherein A. B. is plaintiff, and you are defendant, in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville Fuller, Chief Justice of the said Supreme Court of the United States, this ..... day of ....., in the year of our Lord one thousand eight hundred and .....

G. H.,

One of the Justices of the Supreme Court of the United States [or, Chief Justice of the Supreme Court of the State of California.]<sup>22</sup>

<sup>22</sup> It is not deemed necessary to give a form for a writ of error, as the clerks authorized to issue them are supplied with blanks. Those not familiar with the practice should carefully consult the statute and the rules of the Supreme Court of the United States.



§ 4942. Chief justice of state court may refuse citation. When a final judgment in a suit has been rendered in the highest court of law or equity of a state in which a decision in the suit could be had, and a writ of error has been issued by the clerk of the Circuit Court of the United States, directed to the judges of the court in which the judgment was rendered, commanding that the record be sent before the Supreme Court of the United States to be there reviewed, the presiding judge of the court in which the judgment was rendered is not compelled, as a matter of right, to award a citation to the respondent to appear before the Supreme Court of the United States to maintain the validity of his judgment, but he may look into the record for the purpose of determining whether in his opinion the judgment is one from which a writ of error lies, and if he determines that it is not, he may refuse the citation.<sup>23</sup>

§ 4943. United States district judge. The judge of the United States District Court for the district of Oregon has no authority, while holding the Circuit Court of the United States for the district of California, to sign a citation upon a writ of error from the Supreme Court of the United States to the Supreme Court of this state; nor has he authority to take and approve of the security required in order to make the writ of error a *supersedeas*, and operate as a stay of execution upon the judgment to be reviewed.<sup>24</sup>

<sup>23</sup> Greely v. Townsend, 25 Cal. 608.

<sup>24</sup> Tompkins v. Mahoney, 32 Cal. 231.

## CHAPTER II.

### APPEALS FROM THE SUPERIOR COURTS TO THE SUPREME COURT.

§ 4944. **When may be taken.** An appeal may be taken to the Supreme Court, from a Superior Court, in the following cases: (1) From a final judgment entered in an action, or special proceeding, commenced in a Superior Court, or brought into a Superior Court from another court. (2) From an order granting or refusing a new trial, or granting or dissolving an injunction, or refusing to grant or dissolve an injunction, or appointing a receiver, or dissolving or refusing to dissolve an attachment, or changing or refusing to change the place of trial, from any special order made after final judgment, and from such interlocutory judgment in actions for partition as determines the rights and interests of the respective parties, and directs partition to be made. (3) From a judgment or order granting or refusing to revoke letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, administrator, or guardian; or refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, or legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser or appraisers setting apart a homestead.<sup>1</sup>

<sup>1</sup> Cal. Code Civ. Pro., § 963. as amended by act of 1897; and *id.*, § 939, as amended by act of 1897; *Solomon v. Reese*, 34 Cal. 28; *Doherty v. Thayer*, 31 *id.* 141. For the appellate jurisdiction of the Supreme Court of California, see *ante*, §§ 36-49. When a *remittitur* issues in regular course, the jurisdiction of the Supreme Court ends. *Herlich v. McDonald*, 83 Cal. 505; and see *Kirby v. Superior Court*, 68 *id.* 604; *Heinlen v. Beans*, 73 *id.* 240. Both the Constitution and the statute of South Dakota limit the appellate jurisdiction of the

§ 4945. **Appealable judgments.** A judgment is the final determination of the rights of the parties in an action or proceeding.<sup>2</sup> A judgment, to be final, must give relief by its own force, or be enforceable for that purpose without further action by the court.<sup>3</sup> When an order for judgment has been made and regularly entered by the clerk, and judgment has been drawn up, signed by the judge and filed with the clerk, final judgment has been rendered.<sup>4</sup> The judgment of an inferior court is final, in the sense indicated above, although the litigation may be continued in a higher court upon appeal; but the judgment of a court of last resort is final in another sense, as it conclusively ends the litigation, unless it remands the case to the court below for further proceedings, new trial, or the like. A judgment of the Supreme Court affirming the judgment below is final.<sup>5</sup> But not on an incidental matter collateral to the suit.

A judgment by default is a final judgment; and as to the Supreme Court to a review of the decisions of the courts. *Holden v. Haserodt*, 3 S. Dak. 4; affirming S. C., 2 id. 220. Under the Colorado act of 1885 (Sess. Laws 1885, p. 350), regulating appeals to the Supreme Court, the trial court has no voice whatever in determining whether an appeal will or will not lie in given cases, and the Supreme Court is the only tribunal to pass upon this question. *Daniels v. Miller*, 8 Col. 542.

<sup>2</sup> Id., § 577; *In re Smith*, 98 Cal. 636. And where a cause has been regularly heard and decided, it can be reviewed only in the modes provided by the statute. *Carpenter v. Superior Court*, 75 Cal. 596.

<sup>3</sup> *Bondurant v. Apperson*, 4 Metc. (Ky.) 30; see *In re Smith*, 98 Cal. 636.

<sup>4</sup> *Gray v. Palmer*, 28 Cal. 416; see § 4755, *ante*. When there is no final judgment no appeal can be taken. *Durant v. Comegys*, 2 Idaho, 809. And a judgment to be final must dispose of the case as to all of the parties, and finally dispose of the subject-matter of the litigation. *Watkins v. Mason*, 11 Oreg. 72; *Johnson v. Lighthouse*, 8 Wash. St. 32; *Schultz v. McLean*, 76 Cal. 608; *Mignon v. Brinson*, 74 Tex. 18; *Champ v. Kendrick*, 130 Ind. 545. No appeal can be taken before the judgment is entered. *Schroder v. Schmidt*, 71 Cal. 399. An appeal from a judgment prior to its entry is premature, and will be dismissed. *Onderdonk v. San Francisco*, 75 Cal. 534; *Coon v. Order of Honor*, 76 id. 354. Where a judgment or order is itself appealable, the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set it aside. *Larkin v. Larkin*, 76 Cal. 323; *Goyhinech v. Goyhinech*, 80 id. 409; and see *Ah Kle v. McLean*, 2 Idaho. 812; *Sutton v. Symons*, 100 Cal. 576; *Harper v. Hildreth*, 99 id. 265.

<sup>5</sup> *Mulford v. Estudillo*, 32 Cal. 131.

right of appeal, there is no distinction between judgments by default and those after issue joined and a trial.<sup>6</sup> If the complaint exhibits no cause of action, a judgment by default will be reversed.<sup>7</sup> But the default confesses all the material facts in the complaint.<sup>8</sup> In New York the practice differs, and an appeal does not lie from a judgment by default.<sup>9</sup> So in Nevada, an appeal will not lie from a judgment by default,<sup>10</sup> unless irregularly and erroneously entered.<sup>11</sup>

§ 4946. **Case stated.** An appeal lies from a judgment upon an agreed statement of facts, on an *audita querela*.<sup>12</sup> From judgment on a case submitted in writing for trial, without the intervention of a jury, if no exceptions are taken, no appeal lies.<sup>13</sup>

§ 4947. **Case submitted without action.** A case submitted without action<sup>14</sup> may be determined and judgment rendered thereon as if an action was pending, and is subject to appeal.<sup>15</sup> The case, the submission, and a copy of the judgment constitute the judgment-roll.<sup>16</sup>

<sup>6</sup> *Stevens v. Ross*, 1 Cal. 94; *Burt v. Scrantom*, id. 416; *People v. Woodlief*, 2 id. 241; *Hallock v. Jaudin*, 34 id. 167; *Holman v. Sigourney*, 11 Met. 436; *Ball v. Burke*, 11 Cush. 80; *Henderson v. Gibson*, 19 Md. 234. On an appeal from a judgment by default not taken within sixty days after its entry, nothing can be reviewed except what appears on the judgment-roll. *Savings, etc., Soc. v. Meeks*, 66 Cal. 371; *McDonald v. Swett*, 76 id. 257.

<sup>7</sup> *Abbe v. Marr*, 14 Cal. 210; *Choynski v. Cohen*, 39 id. 502; 2 Am. Dec. 476.

<sup>8</sup> *Rowe v. Table Mt., etc., Co.*, 10 Cal. 444; see § 4292, *ante*.

<sup>9</sup> See N. Y. Code, 1877, § 1294; *Flake v. Van Wagenen*, 54 N. Y. 26; *Miller v. Tyler*, 58 id. 477; *Inness v. Purcell*, id. 388.

<sup>10</sup> *Paul v. Armstrong*, 1 Nev. 82

<sup>11</sup> *Kidd v. The Four Twenty Mfg. Co.*, 3 Nev. 381.

<sup>12</sup> *Hovey v. Crane*, 10 Pick. 440; *Parker v. Inhabitants of Framingham*, 8 Met. 260; *Furlong v. Leary*, 8 Cush. 409; *White v. Olapp*, 8 Allen, 283.

<sup>13</sup> *Bass v. Haverhill Ins. Co.*, 10 Gray, 400. Where judgment is given on the pleadings in an equity case, an appeal may be maintained therefrom, though no exception is taken. *Travis v. Ward*, 2 Wash. St. 30.

<sup>14</sup> Under Cal. Code Civ. Pro., § 1138.

<sup>15</sup> Id., § 1140.

<sup>16</sup> Id., § 1139.

§ 4948. **Consent.** A judgment or order entered by consent is not appealable,<sup>17</sup> not even under a stipulation to that effect.<sup>18</sup> Mere passiveness or silence is not consent such as to bar an appeal.<sup>19</sup> A stipulation not to appeal will be enforced.<sup>20</sup> But such agreement must be based on some consideration, or the facts must estop the party from exercising the right.<sup>21</sup>

§ 4949. **Costs.** A judgment for plaintiff for costs only may be appealed from.<sup>22</sup> In Massachusetts, if the Court of Common Pleas disallowed the defendant's motion for costs upon a discontinuance of a suit, an appeal would lie.<sup>23</sup> Where judgment was rendered for defendant for costs, "but no final determination of the rights of the parties in the action," it is not a final judgment, and no appeal will lie.<sup>24</sup> In an action for libel the plaintiff recovered a verdict for one hundred dollars. The plaintiff filed his bill of costs, amounting to two hundred and seventy-eight dollars, and had judgment for verdict and costs. Defendant moved to strike out the cost bill from the files, because the verdict was for less than three hundred dollars. The motion was denied. On appeal from the order denying the motion, it was held that the motion, if granted, would have effected a modification of the judgment, and that the order refusing the motion could only be reviewed on an appeal from the judgment.<sup>25</sup>

<sup>17</sup> *Meerholz v. Sessions*, 9 Cal. 277; approved in *Brotherton v. Hart*, 11 id. 405; *Erlanger v. Railroad Co.*, 109 id. 395; *Mills v. Brown*, 16 Pet. 525; *Sampson v. Welch*, 24 How. (U. S.) 207; *Lambert v. Moore*, 1 Nev. 231; *Boyd v. Bigelow*, 14 How. Pr. 511; *Van Wormer v. Mayor of Albany*, 18 Wend. 169; *O'Dougherty v. Aldrich*, 5 Den. 385; *Rider v. Barr*, 22 Oreg. 495; *Port v. Parfit*, 4 Wash. St. 369.

<sup>18</sup> *Kelsey v. Forsyth*, 21 How. (U. S.) 85; *Jarvis v. Palmer*, 1 Barb. Ch. 379; *Perkins v. Farnham*, 10 How. Pr. 120.

<sup>19</sup> *San Francisco v. Certain Real Estate*, 42 Cal. 518.

<sup>20</sup> *Townsend v. Masterson Stone D. Co.*, 15 N. Y. 587.

<sup>21</sup> *Ogdensburg & L. C. R. R. Co. v. Vermont & C. R. R. Co.*, 63 N. Y. 176.

<sup>22</sup> *Meeker v. Harris*, 23 Cal. 285; *McDaniels v. Johnson*, 36 Vt. 687; *McGregor v. Comstock*, 19 N. Y. 581. Cases in which it is said no appeal will lie upon a mere question of costs, as being in the discretion of the court, are *Rogers v. Holly*, 18 Wend. 350; *Eastburn v. Kirk*, 2 Johns. Ch. 317; *Travis v. Waters*, 12 Johns. 500.

<sup>23</sup> *Gilbreth v. Brown*, 15 Mass. 178.

<sup>24</sup> *McAlpin v. Bennett*, 21 Tex. 535; *Walmer v. Schulemberger*, 23 Ind. 454.

<sup>25</sup> *Flubacher v. Kelly*, 49 Cal. 116; citing *Lasky v. Davis*, 32 id.

§ 4950. **Nonsuit.** An appeal lies from a judgment of nonsuit; but an appeal will not lie from a judgment after a new trial has been granted,<sup>26</sup> or from judgment of nonsuit entered on the motion of the party.<sup>27</sup> No motion for new trial is necessary.<sup>28</sup>

§ 4951. **Partition.** An appeal may be taken from such interlocutory judgment, in actions for partition, as determines the rights and interests of the respective parties, and directs partition to be made.<sup>29</sup> If the interlocutory judgment in partition adjudges that one of the parties has no interest in the property, it is not a final judgment as to him, from which he can appeal.<sup>30</sup> In Massachusetts, the judgment accepting the report of commissioners, in a petition for partition, is not appealable.<sup>31</sup> In Missouri, a decree that partition be made between the parties is interlocutory, and no appeal will lie.<sup>32</sup>

§ 4952. **Special proceedings.** A judgment finding the amount due on a mortgage, and directing a sale of the mortgaged premises, may be appealed from.<sup>33</sup> In proceeding to con-

677. The Supreme Court of Nevada has jurisdiction of an appeal from an order retaxing costs, made subsequent to judgment, although the case was dismissed by the plaintiff in the court below, and although the amount involved is less than three hundred dollars. *Comstock, etc., Min. Co. v. Allen*, 21 Nev. 325.

<sup>26</sup> *Kower v. Gluck*, 33 Cal. 401.

<sup>27</sup> *Imley v. Beard*, 6 Cal. 666; *Sleeper v. Kelly*, 22 id. 456; *Van Wormer v. Mayor of Albany*, 18 Wend. 169; *O'Dougherty v. Aldrich*, 5 Den. 385. A party who voluntarily dismisses his action, and causes judgment to be rendered thereon, can not prosecute an appeal from such judgment. *Liebmann v. McGraw*, 3 Wash. St. 520. An order refusing a nonsuit is not appealable. *Witkowski v. Hern*, 82 Cal. 604.

<sup>28</sup> *Cravens v. Dewey*, 13 Cal. 42.

<sup>29</sup> Cal. Code Civ. Pro., § 963.

<sup>30</sup> *Peck v. Vandenberg*, 30 Cal. 11. But see the section of the Code, cited *supra*.

<sup>31</sup> *Pierce v. Oliver*, 13 Mass. 211; but see R. S. of Mass., chap. 103, § 19.

<sup>32</sup> *McMurtry v. Glascock*, 20 Mo. 432; *Stephens v. Hume*, 25 id. 349. A decree in a partition suit which ascertains and determines the rights of the parties, and leaves nothing for the court to do but to carry the decree into effect by the appointment of referees, etc., is a final decree, and is appealable. *Walker v. Goldsmith*, 14 Oreg. 125.

<sup>33</sup> *Swan's Pr. & Pl.* 238.

demn land, the decision of the court by which the merits of the matter are finally determined is a final judgment in a special proceeding from which an appeal can be taken, and can not be reviewed on writ of error.<sup>84</sup> A judgment of the Supreme Court, compelling a board of supervisors to execute and deliver to the Central Pacific Railroad Company bonds of said city and county, as specified in the act of California of April 22, 1863, was a final judgment.<sup>85</sup> An appeal may be taken from a judgment rendered by a district judge at chambers in an action of *mandamus*, *certiorari*, or *quo warranto*, or in a special proceeding to try the validity of a corporation election.<sup>86</sup>

§ 4953. **Void judgment.** An appeal may be taken from a void judgment.<sup>87</sup> One is not bound to appeal from a void order or judgment, but may resist it and assert its invalidity at all times.<sup>88</sup>

§ 4954. **Appealable decrees.** To authorize an appeal, the decree must be final on all matters within the pleadings, so that

<sup>84</sup> *Sacramento P. & N. R. R. Co. v. Harlan*, 24 Cal. 334; *San Francisco & San Jose R. R. Co. v. Mahoney*, 29 id. 112; *California, etc., R. R. Co. v. Railroad Co.*, 65 id. 295; and see *Eureka, etc., R. R. Co. v. McGrath*, 74 id. 49.

<sup>85</sup> *People v. Coon*, 25 Cal. 635.

<sup>86</sup> *Brewster v. Hartley*, 37 Cal. 15; *Mining Co. v. Weinstein*, 7 Mont. 346.

<sup>87</sup> *Hastings v. Burning Moscow Co.*, 2 Nev. 93; *Gormly v. McIntosh*, 22 Barb. 271; *Commonwealth v. O'Neill*, 6 Gray, 343; *Trullenger v. Todd*, 5 Oreg. 36; *Merced Bank v. Rosenthal*, 99 Cal. 39; *Garr v. Spalding*, 2 N. Dak. 414; *Sioux Falls Nat. Bank v. McKee*, 3 S. Dak. 1; *Stewart v. Lohr*, 1 Wash. St. 341; 22 Am. St. Rep. 150. An appeal will lie from a judgment rendered on Sunday, although such judgment is a nullity. *Fox v. Nachtsheim*, 3 Wash. St. 684; *City of Parsons v. Lindsay*, 41 Kan. 336; 13 Am. St. Rep. 290; compare *Malone v. Clark*, 2 Hill, 657; *Randall v. Hall*, Hill & D. Supp. 239; *Edwards v. Russell*, 21 Wend. 63; *Striker v. Mott*, 6 id. 465; *Fairbanks v. Corlies*, 1 Abb. Pr. 150.

<sup>88</sup> *Kamp v. Kamp*, 59 N. Y. 212. An appeal will lie from part of a judgment. *Bank of Commerce v. Fuqua*, 11 Mont. 285; 28 Am. St. Rep. 461; *Inverarity v. Stowell*, 10 Oreg. 261; *Healy v. Seward*, 5 Wash. St. 319; or decree. *Shook v. Colohan*, 12 Oreg. 230; or order. *In re Davis' Estate*, 11 Mont. 1. An appeal will lie from that part only of a decree of divorce in favor of the plaintiff which awards the care, custody, and control of the children to the defendant, regardless of the power of the lower court to modify its decree in that respect. *Luck v. Luck*, 83 Cal. 574.

the affirmance of the decree will end the suit.<sup>39</sup> A decree providing for the subsequent collection of money, sale of stock, and payment in accordance with the decree, is still a final decree.<sup>40</sup> A decree is final if it decide the ownership of the property in suit, and directs its immediate transfer, though accounts remain to be taken between the parties.<sup>41</sup> A decree adjudging that the defendant pay a certain sum into court, or in default thereof that a receiver be appointed, is a final decree.<sup>42</sup> A decree of the District Court in admiralty, refusing to order the sale of a vessel as petitioned by one of two part owners, is a final decree.<sup>43</sup> The decrees in the District Court on California land surveys under the acts of Congress are final.<sup>44</sup> From a decree rendered in a suit for divorce an appeal lies;<sup>45</sup> and a decree for the foreclosure and sale of mortgaged premises is a final decree before the return and confirmation.<sup>46</sup> An appeal will lie from a confirmation of a sale in a mortgage case.<sup>47</sup> A decree in a suit to enjoin trustees from selling, dissolving an injunction before granted, and ordering that they shall sell and bring the proceeds into court to abide further orders, is a final decree, from which an appeal lies, within the meaning of the act of 1803.<sup>48</sup>

**§ 4955. Nonappealable decrees.** In chancery a decree is interlocutory whenever an inquiry as to matter of law or fact is directed preparatory to a final decision. But when a decree finally decides and disposes of the whole merits of the cause, it

<sup>39</sup> *Perkins v. Fourniquet*, 6 How. (U. S.) 206, 209; *Oralghead v. Wilson*, 18 id. 199.

<sup>40</sup> *Neall v. Hill*, 16 Cal. 145; 76 Am. Dec. 508.

<sup>41</sup> *Thompson v. Dean*, 7 Wall. 342; see *Forgay v. Conrad*, 6 How. (U. S.) 201.

<sup>42</sup> *Wabash & Erie Canal Co. v. Beers*, 1 Black, 54; *Heroy v. Gibson*, 10 Bosw. 591; *Bailey v. Lane*, 15 Abb. Pr. 373.

<sup>43</sup> *Davis v. The Seneca*, Gilp. 34.

<sup>44</sup> *United States v. Billing*, 2 Wall. 444; *The Fossat Case*, id. 649.

<sup>45</sup> *Conant v. Conant*, 10 Cal. 249; 70 Am. Dec. 717. But an allowance for the support of a child in a decree of divorce is an incident to the decree and is not a final judgment that may be appealed from. *Thomson v. Thomson*, 5 Utah, 401.

<sup>46</sup> *Whiting v. Bank of the United States*, 13 Pet. 6; *Bronson v. Railroad Co.*, 2 Black, 524; *Ray v. Law*, 3 Cranch, 179; *Railroad Co. v. Soutter*, 2 Wall. 440; *Tripp v. Cook*, 26 Wend. 143.

<sup>47</sup> *Hey v. Schooley*, 7 Ohio, 373; *Kern's Adm'r v. Foster*, 16 id. 274.

<sup>48</sup> *Railroad Co. v. Bradleys*, 7 Wall. 575.



is a final decree.<sup>49</sup> A decree ordering a reference and an accounting, and reserving all other matters in controversy, is not final.<sup>50</sup> A general decree, before the funds are collected, that they shall be distributed among certain parties, and appointing a master to state an account, is not a final decree.<sup>51</sup> A decree of the Supreme Court, simply reversing the decree made by an inferior court, and remitting the cause for further proceedings, is not final.<sup>52</sup> Where restitution, with costs and damages, have not been assessed, the decree is not final.<sup>53</sup> A decree that a sum of money is due, but leaving the amount dependent upon other claims, is not final.<sup>54</sup> Where the decree of the District Court was not final, the Circuit Court to which the cause was taken by appeal had no power to act upon the case, nor could it consent to an amendment of the record by the insertion of a final decree by agreement of counsel, nor can this court consent to such an amendment.<sup>55</sup> A supplemental decree of sale is but a decree in execution of the original decree, and not final;<sup>56</sup> nor is a subsequent decree of possession, to put buyer in possession of property sold.<sup>57</sup> A decree dismissing a cross-bill alone is not final.<sup>58</sup>

§ 4956. **Appealable orders.** There are certain orders which by the statute are made appealable, while others can only be

<sup>49</sup> *Mills v. Hoag*, 7 Paige Ch. 18; *Beebe v. Russell*, 19 How. (U. S.) 283.

<sup>50</sup> *Id.*; *Craighead v. Wilson*, 18 How. (U. S.) 199; *Dows v. Congden*, 28 N. Y. 122.

<sup>51</sup> *Ogilvie v. Knox Ins. Co.*, 2 Black, 539.

<sup>52</sup> *The Palmyra*, 10 Wheat. 502; *Chace v. Vasquez*, 11 *id.* 429; *Barnard v. Gibson*, 7 How. (U. S.) 650; *Coffee v. Planters' Bank*, 13 *id.* 11; *Craighead v. Wilson*, 18 *id.* 199; *Harvey v. Richards*, 2 Gall. 216; *Pepper v. Dunlap*, 5 How. (U. S.) 51; *Humiston v. Staint-hop*, 2 Wall. 106; *Winn's Heirs v. Jackson*, 12 Wheat. 135; *Corning v. Troy Iron & Nail Factory*, 15 How. (U. S.) 451; *Griffin v. Orman*, 9 Fla. 22; *Owens v. Love*, *id.* 325.

<sup>53</sup> *The Palmyra*, 10 Wheat. 502; distinguishing *Ray v. Law*, 3 Cranch, 179; *Chase v. Vasquez*, 11 Wheat. 429.

<sup>54</sup> *Montgomery v. Anderson*, 21 How. (U. S.) 386. An interlocutory decree in an action to enforce a trust held not appealable. *Duff v. Duff*, 71 Cal. 513.

<sup>55</sup> *Mordecai v. Lindsay*, 19 How. (U. S.) 199.

<sup>56</sup> *Carr v. Hoxie*, 13 Pet. 460.

<sup>57</sup> *Callan v. May*, 2 Black, 541.

<sup>58</sup> *Ayres v. Carver*, 17 How. (U. S.) 591; see *Scheiffelin v. Weathered*, 19 Oreg. 172.

reviewed upon an appeal from the judgment.<sup>59</sup> Intermediate orders, which are not appealable, may be reviewed, if excepted to, upon appeal from the judgment.<sup>60</sup> An order made by the court, on a motion, is a final adjudication upon the subject-matter, unless appealed from within the statutory time.<sup>61</sup> So an order or judgment upon an award, when such order or judgment is founded upon matter of law apparent on the record, may be appealed from.<sup>62</sup> Any judgment, order, or decree which puts an end to the proceedings may be appealed from; as an order of the County Court dismissing an appeal.<sup>63</sup>

The following are orders involving a substantial right, and which are appealable in the states where the decisions were made:

**§ 4957. Amendment.** An order authorizing the insertion in a complaint of an entirely different cause of action involves a substantial right, and is appealable.<sup>64</sup> In New York, an appeal will not lie from an order granting or refusing an amendment,<sup>65</sup> or imposing terms on granting an amendment,<sup>66</sup> or modifying judgment after actual entry.<sup>67</sup>

<sup>59</sup> The appealable orders are enumerated in Cal. Code Civ. Pro., § 939; subd. 3, and § 963, subd. 2; N. Y. Code, § 1347; see § 4985a, *post*.

<sup>60</sup> *Hilberd v. Smith*, 39 Cal. 145; *Agard v. Valencia*, *id.* 292; *Lowell v. Parkinson*, 4 Utah, 64.

<sup>61</sup> *Kittredge v. Stevens*, 23 Cal. 283.

<sup>62</sup> *Skeels v. Chickering*, 7 Met. 316; *Ward v. American Bank*, *id.* 486.

<sup>63</sup> *Zoller v. McDonald*, 23 Cal. 136. Whether an order is appealable is to be determined by what it purports to determine, and not by what may be its actual operative effect. *In re Bullock*, 75 Cal. 419.

<sup>64</sup> *Sheldon v. Adams*, 41 Barb. 54; S. C., 18 Abb. Pr. 405.

<sup>65</sup> *New York Ice Co. v. N. W. Ins. Co.*, 23 N. Y. 357; S. C., 21 How. Pr. 296; *Audubon v. Excelsior Ins. Co.*, 27 N. Y. 216; *Bennard v. Spring*, 42 Barb. 470; *Thompson v. Kessel*, 30 N. Y. 383; *McCarty v. Edwards*, 24 How. Pr. 236; *Mitchell v. Van Buren*, 27 N. Y. 300; *Walsh v. Washington Ins. Co.*, 32 *id.* 427; also *Owen v. McCormick*, 5 Mont. 255.

<sup>66</sup> *Schermerhorn v. Wood*, 30 How. Pr. 316; *Sheets v. Selden*, 7 Wall. 416.

<sup>67</sup> *Butler v. Niles*, 28 How. Pr. 181; but see *Bryan v. Berry*, 8 Cal. 130; and Code Civ. Pro., § 939. An order of the trial court modifying a judgment in accordance with the directions of the Supreme Court made on a prior trial, and the judgment as modified,

§ 4958. **Attachment.** From an order dissolving or refusing to dissolve an attachment, an appeal will now lie.<sup>68</sup> A judgment giving priority to one creditor over another, as to attached funds of a debtor, but not distributing or giving any other relief to the parties, is not a final order.<sup>69</sup>

§ 4959. **Bill of particulars.** An order directing a bill of particulars, as regards extent to which they are to be furnished, is appealable.<sup>70</sup> But refusal to allow service of such bill of particulars after time expired is discretionary, and not appealable.<sup>71</sup>

§ 4960. **Contempt.** A commitment for contempt for refusing to obey an unlawful order of court can be reviewed and set aside by a Superior Court.<sup>72</sup> In a later case it was held that an appeal may be taken from a judgment for contempt, where the fine imposed is for three hundred dollars, and the court below has exceeded its jurisdiction; the question of jurisdiction being always open for review, and that where all the facts do not appear of record, and would not be brought up on *certiorari*, appeal upon a statement is the proper remedy.<sup>73</sup> But the point was not decided, whether a judgment for contempt rendered

are each appealable. *Randall v. Duff*, 104 Cal. 126. An order granting an amendment to a proposed statement of the case on a motion for a new trial is not appealable. *Yerian v. Linkletter*, 80 Cal. 135; and see *In re Smith*, 98 id. 636.

<sup>68</sup> Cal. Code Civ. Pro., § 939, changing the practice as reported in *Allender v. Fritts*, 24 Cal. 447; *Howell v. Kingsbury*, 15 Wis. 272; *Quebec Bank v. Carroll*, 1 N. Dak. 1; *Red River Nat. Bank v. Freeman*, 1 S. Dak. 196; *Rice v. Jerenson*, 54 Wis. 250; and see *Vaughn v. Dawes*, 7 Mont. 360; *Martin v. Maxey*, 14 id. 85; *Flogg v. Puterbaugh*, 101 Cal. 584. An order dissolving an attachment when no judgment has been rendered in the main action is not a judgment, decree or final order from which an appeal will lie under Oregon Code. *Van Voorhies v. Taylor*, 24 Oreg. 247.

<sup>69</sup> *Hanson v. Bowyer*, 4 Metc. (Ky.) 108.

<sup>70</sup> *Mason v. Ring*, 10 Bosw. 598.

<sup>71</sup> *Goings v. Patten*, 1 Daly, 168.

<sup>72</sup> *Ex parte Rowe*, 7 Cal. 175. An appeal will lie. *Ware v. Robinson*, 9 Cal. 107.

<sup>73</sup> *People v. O'Neill*, 47 Cal. 109. It is now settled that no appeal lies from a judgment rendered in a case of contempt. *Tyler v. Connolly*, 65 Cal. 30; *Sanchez v. Newman*, 70 id. 210; *In re Vance*, 88 id. 262; overruling *People v. O'Neill*, 47 id. 109. Under Colorado practice, contempt proceedings may be brought to the Supreme Court upon writ of error from the final judgment, but the review upon such writ extends only to an inquiry into the jurisdiction of the court entering the judgment. *Cooper v. People*, 13 Col. 337.

by a court having jurisdiction to render it may be reviewed for mere error.<sup>74</sup>

§ 4961. **Decree, setting aside.** An appeal lies from an order setting aside a decree in equity, and granting a rehearing.<sup>75</sup> In Pennsylvania, an order founded on a previous decree to pay money can not be appealed from.<sup>76</sup>

§ 4962. **Dismissal of action.** An order dismissing an action after issue joined is appealable;<sup>77</sup> or from a judgment, upon a plea of abatement.<sup>78</sup> So an appeal will lie where dismissal was on matters of law apparent on the record.<sup>79</sup> If an action is improperly dismissed by the plaintiff, the defendant's remedy is by appeal from the judgment, and not by motion to set it aside.<sup>80</sup>

§ 4963. **Foreclosure.** In Wisconsin, an order that an action for the foreclosure of a mortgage should be referred for the purpose of taking testimony involves the merits of the action, and may be appealed from.<sup>81</sup>

§ 4964. **Injunction.** An appeal may be taken from an order granting or dissolving, or refusing to grant or dissolve, an injunction.<sup>82</sup> An appeal from an interlocutory order granting

<sup>74</sup> See *Aram v. Shallenberger*, 42 Cal. 275; *Pease v. King*, 9 How. Pr. 97.

<sup>75</sup> *Riddle v. Baker*, 13 Cal. 295; *Michigan Ins. Co. v. Whittimore*, 12 Mich. 311.

<sup>76</sup> *Chew's Appeal*, 3 Grant, 204.

<sup>77</sup> *Purple v. Clark*, 5 Pick. 206; see, also, *Heegard v. Trust Co.*, 3 S. Dak. 569; *Gaines v. Cyrus*, 23 Oreg. 403; *Van Horne v. Watrous*, 10 Wash. St. 525; *Railroad Co. v. District Ct.*, 21 Nev. 409; *Hoskins v. McGirl*, 12 Mont. 246; *Adams v. Smith*, 6 Dak. 94. But an appeal will not lie from a judgment dismissing an action for want of prosecution. *Pacific Supply Co. v. Brand*, 7 Wash. St. 357.

<sup>78</sup> *Browning v. Bancroft*, 5 Met. 88; *Morey v. Whittenton Mills*, 8 Cush. 374. A judgment sustaining a demurrer and dismissing the complaint as to one of several defendants is a final judgment from which an appeal will lie. *Stevenson v. Matteson*, 13 Mont. 108.

<sup>79</sup> *Hovey v. Crane*, 10 Pick. 440; *Bowler v. Palmer*, 2 Gray, 553.

<sup>80</sup> *Higgins v. Mahoney*, 50 Cal. 444.

<sup>81</sup> *Oatman v. Bond*, 15 Wis. 20.

<sup>82</sup> Cal. Code Civ. Pro., § 939. And see *Helm v. Gilroy*, 20 Oreg. 417; *Railroad Co. v. Navigation Co.*, 2 Idaho, 405. An order which modifies, and thereby partially dissolves an injunction, is appealable. *Blue Bird Min. Co. v. Murray*, 9 Mont. 46; but see *Railroad Co. v. Wells, Fargo & Co.*, 2 Wash. Ter. 303; *Mahucke v. Tacoma*, 1 Wash. St. 18. An order overruling a motion to dissolve a prelimi-

a temporary injunction will not be sustained when such order was superseded by a final decree before appeal taken.<sup>83</sup> So it seems a decree for an injunction in a patent case, and a reference to a master to take an account of profits is not final.<sup>84</sup> So a decree merely dissolving an injunction, without dismissing the bill, is not final.<sup>85</sup> A decree of the highest court of a state, affirming the decretal order of a state court refusing to dissolve an injunction granted on the filing of the bill, is not a final decree within the meaning of the twenty-fifth section of the Judiciary Act of 1789, from which an appeal lies to the Supreme Court of the United States.<sup>86</sup>

§ 4965. **Judgment, entry of.** An order allowing a motion for the signing of a judgment *nunc pro tunc*, improperly allowed, is appealable.<sup>87</sup> Orders setting aside, or refusing to set aside, judgments or sales under them are, in Wisconsin, appealable.<sup>88</sup> So in Nevada.<sup>89</sup> An appeal lies from an order of the court below changing the judgment.<sup>90</sup> The practice in New York seems to be different.<sup>91</sup>

nary injunction and to vacate an order appointing a receiver in a suit for the dissolution of a partnership and for an accounting, is not appealable. *Basche v. Pringle*, 21 Oreg. 24.

<sup>83</sup> *Easterbrook v. Upton*, 1 Nev. 398.

<sup>84</sup> *Bernard v. Gibson*, 7 How. (U. S.) 650; distinguishing *Forgay v. Conrad*, 6 id. 201.

<sup>85</sup> *McCullum v. Eager*, 2 How. (U. S.) 61; *Young v. Grundy*, 6 Cranch, 51; *Hirhart v. Ballou*, 9 Pet. 156; *Gibbons v. Ogden*, 6 Wheat. 448; *Brown v. Swann*, 9 Pet. 1.

<sup>86</sup> *Gibbons v. Ogden*, 6 Wheat. 448.

<sup>87</sup> *Fairchild v. Dean*, 15 Wis. 206.

<sup>88</sup> *Carney v. La Crosse R. R. Co.*, 15 Wis. 503; *Jessup v. City Bank of Racine*, id. 604.

<sup>89</sup> *Ballard v. Purcell*, 1 Nev. 342; *Maynard v. Johnson*, 2 id. 16. In New York, see *Mortimer v. Nash*, 17 Abb. Pr. 229. In Washington, see *Myers v. Landrum*, 4 Wash. St. 762; *Railroad Co. v. Black*, 3 id. 327; *Whidby Land, etc., Co. v. Nye*, 5 id. 301; *Railway Co. v. Johnson*, 7 id. 97; in South Dakota, *Weber v. Tschetter*, 1 S. Dak. 205. An order denying a motion to set aside a judgment by default is appealable. *McCormick v. Belvin*, 96 Cal. 182; and see *Polerier v. Gravel*, 88 id. 79; *La Fetra v. Gleason*, 101 id. 246. But no appeal lies from an order refusing to vacate an appealable order. *Symons v. Bunnell*, 101 Cal. 223; *Deering v. Richardson-Kimball Co.*, 109 id. 73.

<sup>90</sup> *Bryan v. Berry*, 8 Cal. 130; Cal. Code Civ. Pro., § 939, subd. 3. An order refusing to modify a judgment is not appealable. *Swain v. Burnette*, 89 Cal. 564.

<sup>91</sup> See *Butler v. Niles*, 28 How. Pr. 181.

§ 4966. **Judicial errors.** If, in acting judicially, the court commits an error, the remedy is by appeal, and not by *mandamus*.<sup>92</sup> For an error in law excepted to, an appeal lies without motion for a new trial.<sup>93</sup> Where certain evidence, which was essential to sustain a party's defense, was erroneously excluded, although no evidence whatever on another point likewise essential to his defense, but not available for that purpose in the absence of said excluded evidence, such error is prejudicial, and ground for reversal on appeal of a judgment rendered against him.<sup>94</sup>

§ 4967. **New trial.** An appeal may be taken from an order granting or refusing a new trial;<sup>95</sup> but the motion must have been prosecuted before the District Court.<sup>96</sup> Such an appeal brings up the whole record.<sup>97</sup> Without such an appeal the

<sup>92</sup> *People v. Pratt*, 28 Cal. 166; 87 Am. Dec. 110.

<sup>93</sup> *Rice v. Gashirle*, 13 Cal. 53; Cal. Code Civ. Pro., § 956.

<sup>94</sup> *Jolley v. Foltz*, 34 Cal. 321.

<sup>95</sup> Cal. Code Civ. Pro., § 939; N. Y. Code, § 1347; *Ketchum v. Crippen*, 31 Cal. 365; *Adams v. Bush* (No. 1), 2 Abb. Pr. (N. S.) 104; *Railroad Co. v. Superior Ct.* 105 Cal. 84; *Harper v. Hildreth*, 99 id. 265; *Fish v. Benson*, 71 id. 428; *Estate of Doyle*, 68 id. 132; *In re Bauqueler*, 88 id. 302; *In re Spencer*, 96 id. 448; *Sandmeyer v. Insurance Co.*, 2 S. Dak. 346; *Schultz v. Keeler*, 2 Idaho, 305; otherwise in Oregon. *Beekman v. Hamlin*, 23 Oreg. 313; *McQuald v. Railroad Co.*, 19 id. 535. Review on appeal of new trial order. See § 4967, *ante*; *In re Westerfield*, 96 Cal. 113; *Alpers v. Hunt*, 86 id. 78; *Brison v. Brison*, 90 id. 323; *Wheeler v. Bolton*, 92 id. 159; *Kauffman v. Meler*, 94 id. 269; *Gage v. Downey*, id. 241; *Hegard v. Insurance Co.*, 72 id. 535; *Orth v. Mercantile Inst.*, 5 Utah, 419; *Mattock v. Gouchmour*, 13 Mont. 300; *Grigsby v. Schwarz*, 82 Cal. 278; *Fox v. South. Pac. Co.*, 95 id. 234; *Carron v. Wood*, 10 Mont. 500. Time to appeal. *Schroder v. Schmidt*, 71 Cal. 399; *Brough v. Mighill*, 6 Utah, 317; *Nelson v. Donovan* 14 Mont. 78; notice of appeal. *Watson v. Sutro*, 77 Cal. 609; *Winter v. McMillan*, 87 id. 256; *Moore v. Development Co.*, 87 id. 483; *Gumpel v. Castagnetto*, 97 id. 15; papers on. *Arnold v. Sinclair*, 12 Mont. 248; *McLeod v. Dickerson*, 11 id. 438; order affirmed, when. *Kennedy v. Board of Education*, 82 Cal. 483; *Douglass v. McFarland*, 92 id. 656; dismissal of appeal, *Scott v. Glenn*, 98 id. 168; *Perkins v. Wakeham*, 86 id. 580; *Forni v. Yoell*, 95 id. 442; *People v. Burns*, 78 id. 645; stay of execution. *Kirwan v. Hunnewill*, 91 id. 157; questions of law. *Santa Marina v. Conolly*, 79 id. 517.

<sup>96</sup> Cal. Code Civ. Pro., § 963; *Mahoney v. Wilson*, 15 Cal. 42; *Frank v. Doane*, id. 303; *Green v. Doane*, id. 304.

<sup>97</sup> *Hanscom v. Tower*, 17 Cal. 518; *Walden v. Murdock*, 23 id. 540; 83 Am. Dec. 135.

Supreme Court can not review the evidence to determine whether the verdict or findings are sustained by it.<sup>98</sup>

§ 4968. **Receiver.** An appeal lies from an order refusing to appoint a receiver in proceedings supplementary to execution against a judgment debtor.<sup>99</sup> An order setting aside or opening the biddings on a judicial sale, regular in itself, is not appealable;<sup>100</sup> or an order denying a stay of trial in one cause until determination of another;<sup>101</sup> or refusal to adjourn the hearing before a referee.<sup>102</sup>

§ 4969. **Reference.** Granting reference in cases not properly referable is appealable;<sup>103</sup> or for refusing to enter decree on report of referee.<sup>104</sup>

§ 4970. **Special orders after judgment.** An appeal may be taken from any special order made after final judgment.<sup>105</sup>

<sup>98</sup> *Green v. Butler*, 26 Cal. 595; *Clark v. Gridley*, 49 id. 105.

<sup>99</sup> *Heroy v. Gibson*, 10 Bosw. 591; *Bailey v. Lane*, 15 Abb. Pr. 373. Under laws of Washington, an appeal may be taken from any order appointing or removing, or refusing to appoint or remove, a receiver. *Armstrong v. Ford*, 10 Wash. St. 64; and see *Radebaugh v. Railroad Co.*, 8 id. 570. Extent of review. See *Roberts v. National Bank*, 9 Wash. St. 12; *State v. District Ct.*, 15 Mont. 324. Appeal from order denying application for leave to sue receiver. *Meeker v. Sprague*, 5 Wash. St. 242; from order relative to compensation of receiver. *Thompson v. Lumber Co.*, 5 Wash. St. 527; *Martin v. Martin*, 14 Oreg. 165; from order directing receiver to pay fund into court. *Coburn v. Ames*, 80 Cal. 243. An order appointing a receiver is not subject to appeal in Montana. *Stebbins v. Savage*, 5 Mont. 253; and see *United States v. Church*, 5 Utah, 394. And it is held in Washington that an appeal will not lie from an order removing one receiver and appointing another in his stead. *State v. Superior Ct.*, 7 Wash. St. 74. Approval of receiver's account — nonappealable order. See *Rochat v. Gee*, 91 Cal. 355.

<sup>100</sup> *Hazleton v. Wakeman*, 3 How. Pr. 357; *Wakeman v. Price*, 3 N. Y. 334; *Buffalo Savings Bank v. Newton*, 23 N. Y. 160.

<sup>101</sup> *James v. Chalmers*, 2 Seld. 209.

<sup>102</sup> *Carpenter v. Haynes*, 1 N. Y. Code R. 414.

<sup>103</sup> *Whitaker v. Desfosse*, 7 Bosw. 678; *Harris v. Mead*, 16 Abb. Pr. 257; *Dickenson v. Mitchell*, 19 id. 286.

<sup>104</sup> *Ludlum v. Fourth District Court*, 9 Cal. 7.

<sup>105</sup> Cal. Code Civ. Pro., § 963; see *Hayes v. District Ct.*, 11 Mont. 225; *Dietrich v. Steam Dredge*, 14 id. 261; *Shepard v. Gensler*, 10 Wash. St. 41. What papers will be considered on the appeal. *Peltret v. Frank*, 66 Cal. 34; and see *Savings, etc., Soc. v. Meeks*, 66 id. 371. An appeal from an order made after judgment striking out a cost bill does not lie where the amount of the costs claimed is less



Appeals from orders after judgment are allowed to correct erroneous proceedings subsequent to and founded on a good judgment.<sup>106</sup> In Massachusetts an appeal lies from a decision of a Court of Common Pleas arresting judgment in a civil action;<sup>107</sup> an order made by judge at chambers setting aside an execution and perpetually staying the enforcement of the same;<sup>108</sup> or from an order refusing the issuance of an execution, on the grounds of a counter-judgment without opposition, to test the right to have the application granted;<sup>109</sup> or an order refusing to quash an execution;<sup>110</sup> but not from an order that execution issue.<sup>111</sup> An appeal lies from a judgment on a rule of court dismissing an opposition to an order of seizure and sale.<sup>112</sup> The act of the district judge in granting an order of seizure and sale is a judicial act from which an appeal will lie;<sup>113</sup> or an order denying attachment against party refusing to be examined in supplementary proceedings.<sup>114</sup> An order denying a motion to dismiss a motion for a new trial may not be appealed from, nor can an exception to the ruling be considered upon an appeal, unless it is made part of the record upon appeal from an order which grants, or which in effect operates as a denial of, the motion for a new trial.<sup>115</sup>

**§ 4971. Striking out.** An order striking out from the answer matter constituting a good defense, is reviewable on appeal from the final judgment.<sup>116</sup>

than \$300, and such an appeal must be dismissed for want of jurisdiction. *Perry v. Quackenbush*, 105 Cal. 299; and see *Lee Chuck v. Quan Wo Chong*, 91 Id. 593. An order denying a motion to amend the minutes of the trial court after judgment is not an appealable order. *Griess v. Investment Co.*, 93 Cal. 411.

<sup>106</sup> *Howard v. Richards*, 2 Nev. 128.

<sup>107</sup> *Bemis v. Faxon*, 2 Mass. 141.

<sup>108</sup> *Bond v. Pacheco*, 30 Cal. 530.

<sup>109</sup> *Belts v. Garr*, 26 N. Y. 383; *Horton v. Miller*, 44 Penn. St. 256; see *Shuman v. Strauss*, 52 N. Y. 404.

<sup>110</sup> *Gilman v. Contra Costa Co.*, 8 Cal. 52; 68 Am. Dec. 290; *Cooley v. Gregory*, 16 Wis. 303.

<sup>111</sup> *Mount v. Mitchell*, 31 N. Y. 356.

<sup>112</sup> *Heft v. Kelty*, 17 La. Ann. 144.

<sup>113</sup> *Commissioners v. Marks*, 16 La. Ann. 112.

<sup>114</sup> *Holstein v. Rice*, 24 How. Pr. 135.

<sup>115</sup> *Griess v. Investment Co.*, 93 Cal. 411; and see *Holmes v. McOleary*, 63 Id. 497; *McDonald v. McConkey*, 57 Id. 325; *Larkin v. Larkin*, 76 Id. 323.

<sup>116</sup> *Rapalee v. Stewart*, 27 N. Y. 310. An order striking a state-



§ 4972. **Supplemental complaint.** An order allowing a supplemental complaint to be made may be appealed from.<sup>117</sup> Under the statute of Minnesota an appeal lies from a decision of referees appointed to assess damages for the occupation of complainant's land; <sup>118</sup> or from the decision of the county commissioners in a controversy about a ferry.<sup>119</sup>

§ 4973. **Suspending attorney.** An order by a District Court suspending or removing an attorney is appealable.<sup>120</sup>

The following are nonappealable orders in the states where the decisions were rendered:

§ 4974. **Discretion of court.** An order or matter resting in the discretion of the court, or a question of pure practice, does not involve the merits, and is not appealable;<sup>121</sup> as an order granting or refusing a favor.<sup>122</sup> But the refusal to exercise discretion on the ground of want of power is error of law, and a ground of appeal;<sup>123</sup> or a palpable abuse of discretion;<sup>124</sup> or mistake;<sup>125</sup> or an order in statutory proceedings, where limits imposed by the Legislature on the exercise of discretion are exceeded.<sup>126</sup>

ment on motion for a new trial from the files is an appealable order. *Sutton v. Symons*, 100 Cal. 576. But no appeal lies from an order striking out an answer. *Beach v. Hodgdon*, 66 Cal. 187; or from an order or decision striking out a complaint. *Clifford v. Allman*, 84 Cal. 528; *Owen v. McCormick*, 5 Mont. 255. Order refusing to strike amended complaint from files not appealable, when. See *Sharp v. Miller*, 66 Cal. 98. Review of motion to strike out pleadings. See *Sutton v. Stephan*, 101 Cal. 545.

<sup>117</sup> *Cheeseman v. Sturges*, 19 Abb. Pr. 293.

<sup>118</sup> *Paddox v. St. Croix Corporation*, 8 Minn. 277; *Ames v. Mississippi, etc., Co.*, id. 467. Appeal from order overruling exceptions to report of referee. See *Townsend v. Petersen*, 12 Col. 491.

<sup>119</sup> *Carothers v. Wheeler*, 1 Oreg. 194.

<sup>120</sup> Cal. Code Civ. Pro., § 287, subd. 5.

<sup>121</sup> *Jorgensen v. Boehmer*, 9 Minn. 181; *Vincent v. Wellington*, 18 Wis. 159; *Cushman v. Brundett*, 50 N. Y. 296; *White v. Coulter*, 59 id. 629.

<sup>122</sup> *Fort v. Bard*, 1 Comst. 43; *Mead v. Mead*, 2 E. D. Smith, 223.

<sup>123</sup> *Tilton v. Beecher*, 59 N. Y. 176; 17 Am. Rep. 337; *Equitable L. Ins. Co. v. Stevens*, 63 N. Y. 341; *Morris v. Wheeler*, 45 id. 708; *The King v. The Justice, etc.*, 14 East, 395.

<sup>124</sup> *Platt v. Kelly*, 16 Abb. Pr. 188; *Fredericks v. Taylor*, 52 N. Y. 596; S. C., 14 Abb. Pr. (N. S.) 77.

<sup>125</sup> *Fields v. Moul*, 15 Abb. Pr. 6.

<sup>126</sup> *In re Livingston's Petition*, 34 N. Y. 555.

§ 4975. **Discretionary orders — parties.** An appeal will not lie from the refusal of the court to permit a party to be made co-defendant;<sup>127</sup> or from an order making a new party defendant;<sup>128</sup> or an order denying a motion for leave to intervene.<sup>129</sup> A motion to renew an action, made with notice to the surviving defendant only, and denied, can not be appealed from.<sup>130</sup>

§ 4976. **Discretionary orders — transfer.** An appeal lies from an order refusing to transfer a cause from a state court to a federal court, because of alienage of defendant.<sup>131</sup>

§ 4977. **Discretionary orders — practice.** No appeal lies from an order regulating a mode of proceeding, and within the judicial discretion.<sup>132</sup> So of an order or decision as to right to begin or close case;<sup>133</sup> or an order suspending trial to bring in further evidence;<sup>134</sup> or an order staying proceedings until further direction of the court;<sup>135</sup> from an order restoring the cause to the calendar for trial;<sup>136</sup> from an order of court refusing to set aside a former order.<sup>137</sup> When two orders are made, the latter affirming the former, appeal must be made from the latter.<sup>138</sup> The party can not fall back, and seek to reverse the order by a direct appeal.<sup>139</sup> No appeal lies from an order of court refusing to set aside an interlocutory judgment;<sup>140</sup> or an order granting leave to renew a motion;<sup>141</sup> or an order refusing to dismiss a

<sup>127</sup> *Roberts v. Patton*, 18 Mo. 485.

<sup>128</sup> *Beck v. San Francisco*, 4 Cal. 375. An order substituting a party plaintiff is not appealable. *Welsh v. Allen*, 54 Cal. 211.

<sup>129</sup> *Wenborn v. Boston*, 23 Cal. 321; *Scheldt v. Sturgis*, 10 Bosw. 606. An order dismissing the petition of an intervenor is no ground of appeal for the defendant. *McRobbie v. Higginbotham*, 11 Col. 312.

<sup>130</sup> *Union Bank v. Mott*, 27 N. Y. 633.

<sup>131</sup> *Hopper v. Kalkman*, 17 Cal. 517; *Brooks v. Calderwood*, 19 id. 124.

<sup>132</sup> *McCoun v. N. Y. C. & H. R. R. Co.*, 50 N. Y. 176; *Arthur v. Griswold*, 60 id. 143.

<sup>133</sup> *Fry v. Bennett*, 28 N. Y. 324.

<sup>134</sup> *Phelps v. Ward*, 10 Bosw. 617.

<sup>135</sup> *Rhodes v. Craig*, 21 Cal. 419.

<sup>136</sup> *Dimick v. Deringer*, 32 Cal. 488.

<sup>137</sup> *Gates v. Walker*, 35 Cal. 289; *Hastings v. Cunningham*, 35 id. 549; *Culver v. Hollister*, 17 Abb. Pr. 405.

<sup>138</sup> *Horn v. Volcano Water Co.*, 18 Cal. 141.

<sup>139</sup> *Id.*

<sup>140</sup> *Stearns v. Marvin*, 3 Cal. 376.

<sup>141</sup> *Smith v. Spaulding*, 30 How. Pr. 339.

cause for want of prosecution is not appealable.<sup>142</sup> But the dismissal of an action is final;<sup>143</sup> or an order refusing to substitute assignee *pendente lite* as party;<sup>144</sup> or striking out cause from General Term calendar;<sup>145</sup> or an order refusing a continuance.<sup>146</sup>

§ 4978. **Interlocutory orders.** An order which does not determine the controversy, but leaves it to proceed, is not appealable.<sup>147</sup> An appeal will not lie from an interlocutory order, except in cases provided by statute;<sup>148</sup> or an order denying a rehearing of a decree of this nature.<sup>149</sup> An appeal does not lie from an order for judgment on a frivolous answer;<sup>150</sup> or an order striking out scandalous matter;<sup>151</sup> or striking out an answer as sham or irrelevant;<sup>152</sup> or an order for judgment on partial demurrer;<sup>153</sup> or an order overruling a demurrer;<sup>154</sup> or an order sustaining a demurrer.<sup>155</sup> In Minnesota, under the statute of 1861, an appeal is allowed from any order made upon a demurrer.<sup>156</sup>

<sup>142</sup> *Waldo v. Rice*, 18 Wis. 404; *Lamphear v. Lamprey*, 4 Mass. 107.

<sup>143</sup> *Tappan v. Bruen*, 5 Mass. 193; *Wood v. Ross*, 11 id. 275.

<sup>144</sup> *Packard v. Wood*, 17 Abb. Pr. 318.

<sup>145</sup> *Cotes v. Smith*, 31 How. Pr. 146.

<sup>146</sup> *Haraszthy v. Horton*, 46 Cal. 546.

<sup>147</sup> *Illius v. N. Y. & N. H. R. R. Co.*, 3 Kern. 597; *Kanouse v. Martin*, 6 How. Pr. 240; *Duane v. Northern R. R. Co.*, 3 N. Y. 545. An order or judgment which does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, is interlocutory and not final, and is nonappealable. *Hagerman v. Moore*, 2 Col. App. 83; *Dusing v. Nelson*, 7 Col. 134.

<sup>148</sup> *People v. Thurston*, 5 Cal. 517; *Juan v. Ingoldsby*, 6 id. 439; *De Barry v. Lambert*, 10 id. 503; *Baker v. Baker*, id. 527; *Harris v. Clark*, 4 How. Pr. 78; *Cruger v. Douglass*, 2 Comst. 571; *Chittenden v. Missionary Society*, 8 How. Pr. 327; *Swarthout v. Curtis*, 4 N. Y. 415.

<sup>149</sup> *King v. Merchants' Exchange Co.*, 1 Seld. 547.

<sup>150</sup> *Dunham v. Nicholson*, 4 How. Pr. 140; see, also, *Wilkin v. Raplee*, 52 N. Y. 248.

<sup>151</sup> *Opdyke v. Marble*, 18 Abb. Pr. 375.

<sup>152</sup> *Briggs v. Bergen*, 23 N. Y. 162; *Hanover Fire Ins. Co. v. Tomlinson*, 58 id. 651; *Tabor v. Gardner*, 41 id. 332; see § 4971, *ante*.

<sup>153</sup> *Paddock v. Springfield F. & M. Ins. Co.*, 2 Kern. 501.

<sup>154</sup> *Bennett v. Nichols*, 12 Mich. 22; *Ford v. David*, 13 How. Pr. 193; *Rutherford v. Fisher*, 4 Dall. 22; *Smith v. McEvoy*, 8 Utah, 58.

<sup>155</sup> *Rutherford v. Fisher*, 4 Dall. 22; *McClay v. Hanna*, id. 160; *Miners' Bank v. United States*, 5 How. (U. S.) 215; *Blakely v. Fisk*, Hempst. 11; *Mason County v. Dunbar*, 10 Wash. St. 163; *Olympia v. Mann*, 1 id. 389.

<sup>156</sup> *St. Paul Division v. Brown*, 9 Minn. 151.

So in Massachusetts, for the cause that the declaration does not state a legal cause of action.<sup>157</sup> An appeal in a criminal case may be taken from an order allowing a demurrer, though final judgment be not entered.<sup>158</sup> An appeal does not lie from an order entering a default;<sup>159</sup> an order dismissing an action as to one party, made before judgment;<sup>160</sup> an order dismissing a cross-complaint on demurrer to the same;<sup>161</sup> an order made before judgment, staying all proceedings until further order.<sup>162</sup>

§ 4979. *Interlocutory orders — costs.* An appeal does not lie from an order correcting an award of costs on *certiorari*,<sup>163</sup> or awarding costs against executor refusing to refer;<sup>164</sup> or requiring a receiver to give security for costs;<sup>165</sup> or from an order made on a motion to retax costs. The error can be revised only on an appeal from the judgment;<sup>166</sup> or an order allowing costs on a peremptory *mandamus*,<sup>167</sup> or an order made on motion to open a judicial sale on grounds not affecting the regularity of the proceedings;<sup>168</sup> or an order for an extra allowance of costs.<sup>169</sup>

§ 4980. *Interlocutory orders — evidence.* An appeal does not lie from a decision that a deposition is or is not regularly taken;<sup>170</sup> or from an order refusing to issue a commission to take testimony;<sup>171</sup> or an order striking out interrogatories attached to a pleading;<sup>172</sup> or an order admitting affidavits on

<sup>157</sup> *Amherst R. R. Co. v. Watson*, 4 Gray, 61.

<sup>158</sup> *People v. Logan*, 1 Nev. 110.

<sup>159</sup> *Ricketson v. Compton*, 23 Cal. 650.

<sup>160</sup> *Dimick v. Deringer*, 32 Cal. 492.

<sup>161</sup> *Daniels v. Lansdale*, 38 Cal. 567.

<sup>162</sup> *Rhodes v. Craig*, 21 Cal. 419.

<sup>163</sup> *People v. Robinson*, 25 How. Pr. 345.

<sup>164</sup> *Niblo v. Binsse*, 31 How. Pr. 476.

<sup>165</sup> *Bolles v. Duff*, 17 Abb. Pr. 448.

<sup>166</sup> *Laskey v. Davis*, 33 Cal. 677.

<sup>167</sup> *People v. Albright*, 14 Abb. Pr. 305.

<sup>168</sup> *Kingsland v. Bartlett*, 28 Barb. 480.

<sup>169</sup> *Krekeler v. Ritter*, 62 N. Y. 372. An order on a motion to tax a cost bill, made after the rendition and entry of final judgment, can be reviewed only on a direct appeal therefrom. *Empire Co. v. Bonanza Co.*, 67 Cal. 406.

<sup>170</sup> *Hix v. Fisher*, 1 Wins. (N. C.) L. No. 2, 84.

<sup>171</sup> *People v. Stillman*, 7 Cal. 117.

<sup>172</sup> *Davenport Co. v. Davenport*, 15 Iowa, 6.

motion;<sup>173</sup> or stopping cross-examination, unless in case of manifest abuse or injustice.<sup>174</sup>

§ 4981. **Interlocutory orders — new trial.** An appeal does not lie from an order denying motion for new trial on ground of surprise;<sup>175</sup> or refusing to amend an order allowing time to move for a new trial;<sup>176</sup> or striking out or refusing to strike out a statement made on motion for a new trial;<sup>177</sup> or from an order denying a motion to certify a statement;<sup>178</sup> or directing such statement to be settled.<sup>179</sup> Upon a bill for relief against a judgment at law, a decree granting a new trial on terms, and not dismissing the bill on making the injunction perpetual, is an interlocutory order, and not appealable.<sup>180</sup>

§ 4982. **Interlocutory orders — receiver.** An appeal does not lie from an order directing a receiver to distribute the funds in his hands, unless it is the final result of the proceeding;<sup>181</sup> or as to appointment or substitution of receiver;<sup>182</sup> or refusal to allow receiver to commence action.<sup>183</sup>

§ 4983. **Interlocutory orders — reference.** An appeal does not lie from an order granting a reference in referable causes;<sup>184</sup> or

<sup>173</sup> Childs v. Fox, 18 Abb. Pr. 112.

<sup>174</sup> Great Western Turnpike Co. v. Loomis, 32 N. Y. 127; 88 Am. Dec. 311.

<sup>175</sup> Selden v. Del. & Hud. Canal Co., 29 N. Y. 634; Bedell v. Chase, 34 id. 386; Shuttleworth v. Winter, 55 id. 624; White v. Harvey, 23 Ind. 55.

<sup>176</sup> Pendegast v. Knox, 32 Cal. 73; Quivey v. Gambert, id. 304.

<sup>177</sup> Ketchum v. Crippen, 31 Cal. 365; Genella v. Relyea, 32 id. 159; Pendegast v. Knox, id. 73; Quivey v. Gambert, id. 304; but see Macy v. Davila, 48 id. 646; Calderwood v. Peyser, 42 id. 110; Clark v. Orane, 57 id. 633. An order striking a new trial statement from the files is appealable. Sutton v. Symons, 100 Cal. 576.

<sup>178</sup> Genella v. Relyea, 32 Cal. 159.

<sup>179</sup> Leffingwell v. Griffing, 29 Cal. 912. While a motion for a new trial is pending, there is no "final order" from which an appeal can be taken. Mitchell v. Downing, 23 Oreg. 448.

<sup>180</sup> Lea v. Kelly, 15 Pet. 213.

<sup>181</sup> Adams v. Woods, 21 Cal. 165.

<sup>182</sup> Siney v. New York Consol. Stage Co., 28 How. Pr. 481; Jane-way v. Green, 16 Abb. Pr. 215; Stebbins v. Savage, 4 West Coast Rep. 477; see § 4968, *ante*.

<sup>183</sup> Petition of Reeve, 34 N. Y. 359.

<sup>184</sup> Welsh v. Darragh, 52 N. Y. 590; Kain v. Delano, 11 Abb. Pr. (N. S.) 29.

the findings of a referee in a divorce case;<sup>185</sup> or as to decisions of a referee in relation to alimony;<sup>186</sup> or directly to an order overruling exceptions to a referee's report;<sup>187</sup> or an order vacating an order of reference.<sup>188</sup>

§ 4984. **Interlocutory orders — vacating judgment.** An appeal lies direct from a judgment, but not from an order refusing to set it aside<sup>189</sup> on the ground of irregularity.<sup>190</sup> But an order vacating a judgment by confession, on account of a defect in the statement, was held appealable,<sup>191</sup> or refusing to set aside an execution merely voidable.<sup>192</sup>

§ 4985. **Void order.** It is not necessary to appeal from a void order which can have no operation or effect.<sup>193</sup>

§ 4985a. **Appealable orders — miscellaneous.** In addition to the instances of appealable orders heretofore given (§ 4956, *ante*), are the following: An order vacating an order which vacated a former order setting aside a sheriff's sale under foreclosure judgment;<sup>194</sup> an order for the payment of counsel fees and alimony;<sup>195</sup> order changing venue;<sup>196</sup> or denying change of

<sup>185</sup> *Baker v. Baker*, 10 Cal. 527.

<sup>186</sup> *Forrest v. Forrest*, 25 N. Y. 501.

<sup>187</sup> *Peck v. Courtis*, 31 Cal. 207.

<sup>188</sup> *Hastings v. Cunningham*, 35 Cal. 553.

<sup>189</sup> *Peralta v. Castro*, 15 Cal. 511; *Fisher v. Hepburn*, 48 N. Y. 41; *White v. Coulter*, 59 *id.* 629; *Maples v. Geller*, 1 Nev. 233; *Fort v. Bard*, 1 Comst. 43; *Fasset v. Tallmadge*, 15 Abb. Pr. 205. An order setting aside a judgment is not a final order from which an appeal will lie. *Greene v. Williams*, 6 Wash. St. 260; *Lillenthal v. Wright*, 1 *id.* 1; *Gower v. Gower*, *id.* 16. Review of erroneous ruling in rendering judgment on pleadings. See *Weeks v. Mining Co.*, 78 Cal. 599. An appeal from a judgment regular on its face is not the proper remedy for a party seeking to set it aside for fraud. *Lang Syne Min. Co. v. Ross*, 20 Nev. 127; see § 4965, *ante*.

<sup>190</sup> *Jones v. Derby*, 16 N. Y. 242; *Sherman v. Felt*, 2 Comst. 186; *Ingersoll v. Bostwick*, 22 N. Y. 425; *Lake Ontario, Auburn & N. Y. R. R. Co. v. Marvin*, 18 *id.* 585; *McCormick v. Pickering*, 4 Comst. 276; *Cathin v. Billings*, 16 N. Y. 622; *Pendleton v. Weed*, 17 *id.* 72.

<sup>191</sup> *Belknap v. Waters*, 14 N. Y. 477.

<sup>192</sup> *Bank of Genesee v. Spencer*, 18 N. Y. 150.

<sup>193</sup> *Killip v. Empire Mill Co.*, 2 Nev. 34; *Kamp v. Kamp*, 59 N. Y. 212. An appeal lies from a portion of an order. *In re Davis' Estate*, 11 Mont. 1.

<sup>194</sup> *Bailey v. Scott*, 1 S. Dak. 337.

<sup>195</sup> *In re Finkelstein*, 13 Mont. 425; *State v. District Ct.*, 14 *id.* 396; *Langan v. Langan*, 86 Cal. 132; *Sharon v. Sharon*, 67 *id.* 185; *contra*, *Wyatt v. Wyatt* 2 Idaho, 219.

<sup>196</sup> *Proder v. Conklin*, 98 Cal. 360; *Fitzpatrick v. Fitch*, 83 *id.* 490;

venue;<sup>197</sup> order for distribution of funds held by assignee;<sup>198</sup> or order settling the final account of an assignee in insolvency;<sup>199</sup> order for a distribution of funds collected by the receiver in a certain action;<sup>200</sup> order sustaining objections to the final account of an administrator;<sup>201</sup> order granting or refusing an adjudication in insolvency;<sup>202</sup> order denying petition to vacate order appointing administrator;<sup>203</sup> order refusing to vacate or modify an order for writ of possession;<sup>204</sup> order of trial court refusing to settle bill of exceptions;<sup>205</sup> order granting a writ of assistance;<sup>206</sup> order authorizing an executor to mortgage lands of the estate;<sup>207</sup> order appointing guardian of minor;<sup>208</sup> or order appointing guardian of the person and estate of an incompetent person;<sup>209</sup> order directing guardian to pay over funds to ward;<sup>210</sup> order denying motion to set aside an order for an examination of a judgment debtor upon supplementary proceedings;<sup>211</sup> order refusing a writ of mandate;<sup>212</sup> order overruling a motion to quash an execution;<sup>213</sup> order of confirmation of sheriff's sale on execution;<sup>214</sup> and an order made at chambers,

*contra*, *State v. Shaw*, 21 Nev. 222; *Bogle v. Co-operative Colony*, 3 Wash. St. 138.

<sup>197</sup> *In re Davis' Estate*, 11 Mont. 1; *Bookwater v. Conrad*, 14 id. 62; *White v. Railroad Co.*, 5 Dak. 508.

<sup>198</sup> *In re Frasch*, 5 Wash. St. 344.

<sup>199</sup> *In re Tanner*, 70 Cal. 22.

<sup>200</sup> *State v. Superior Ct.*, 3 Wash. St. 696.

<sup>201</sup> *In re De War's Estate*, 10 Mont. 422. An order setting aside a decree settling the final account of an executor, though not directly appealable, may be reviewed on an appeal by the executor from a subsequent decree settling his final account. *In re Cahalan*, 70 Cal. 604; see *In re Rose*, 80 id. 166.

<sup>202</sup> *Widber v. Superior Ct.*, 94 Cal. 430.

<sup>203</sup> *In re Davis' Estate*, 11 Mont. 196.

<sup>204</sup> *Green v. Hebbard*, 95 Cal. 39.

<sup>205</sup> *Stonesifer v. Kilburn*, 94 Cal. 33.

<sup>206</sup> *Davis v. Donner*, 82 Cal. 35.

<sup>207</sup> *In re McConnell*, 74 Cal. 217.

<sup>208</sup> *In re Get Young*, 90 Cal. 77.

<sup>209</sup> *In re Kane's Estate*, 12 Mont. 197.

<sup>210</sup> *In re Guardianship of Hill's Heirs*, 7 Wash. St. 421.

<sup>211</sup> *Barber v. Briscoe*, 9 Mont. 341. Nonappealable order in supplementary proceedings. See *Rule v. Gumeer*, 12 Col. 591.

<sup>212</sup> *People v. Thompson*, 66 Cal. 396.

<sup>213</sup> *Orr v. Haskell*, 2 Mont. 350; and see *Mining Co. v. Weinstein*, 7 id. 347.

<sup>214</sup> *Dell v. Estes*, 10 Oreg. 359.

refusing to stay execution upon a judgment entered, is a "special order made after final judgment," and is appealable.<sup>215</sup>

§ 4985b. **Nonappealable orders — miscellaneous.** Among instances of nonappealable orders under various statutes are the following: An order directing an involuntary insolvent to verify his schedule and inventory;<sup>216</sup> order for suit in name of administratrix;<sup>217</sup> order appointing a special administrator;<sup>218</sup> order refusing to remove an administrator;<sup>219</sup> order refusing to vacate order denying petition of executor for extra compensation;<sup>220</sup> order setting aside an order settling an account of the assignee of an insolvent debtor;<sup>221</sup> order refusing to set aside an order distributing the estate of a decedent, and settling the final account of the executor;<sup>222</sup> order striking out an amended complaint;<sup>223</sup> order refusing application for judgment upon findings of jury;<sup>224</sup> order granting motion for judgment on the pleadings;<sup>225</sup> order refusing to suspend or postpone a decree of final distribution;<sup>226</sup> order upon a petition for the removal of an assignee of an insolvent;<sup>227</sup> order appointing an assignee in place of one appointed by the assignor;<sup>228</sup> order overruling a motion to tax or retax costs;<sup>229</sup> order of arrest in civil action;<sup>230</sup> order setting aside award of arbitrators;<sup>231</sup> order restraining foreclosure of chattel mortgage by advertisement;<sup>232</sup> order refusing an order enjoining foreclosure proceedings;<sup>233</sup> interlocutory order or decree, dividing real estate and granting a manda-

<sup>215</sup> *Clarke v. Gonn*, 2 Mont. 538.

<sup>216</sup> *In re Abbott*, 74 Cal. 381.

<sup>217</sup> *In re Ohm*, 82 Cal. 160.

<sup>218</sup> *In re Carpenter*, 73 Cal. 202.

<sup>219</sup> *In re Estate of Moore*, 68 Cal. 394.

<sup>220</sup> *In re Walkerly*, 94 Cal. 352.

<sup>221</sup> *Etchebarne v. Roeding*, 89 Cal. 517.

<sup>222</sup> *Lutez v. Christy*, 67 Cal. 457.

<sup>223</sup> *Cleland v. Walbridge*, 78 Cal. 358.

<sup>224</sup> *Persons v. Simons*, 1 N. Dak. 243.

<sup>225</sup> *Nelson v. Donovan*, 14 Mont. 78; *Holton v. Noble*, 83 Cal. 7.

<sup>226</sup> *Estate of Burdick*, 112 Cal. 387.

<sup>227</sup> *In re Goldsmith*, 12 Oreg. 414; and see *Mitchell v. Powers*, 16 Id. 491.

<sup>228</sup> *State v. Parker*, 6 Wash. St. 411.

<sup>229</sup> *Rader v. Nottingham*, 2 Mont. 157; *First Nat. Bank v. Neill*, 13 Id. 380.

<sup>230</sup> *Cline v. Harmon*, 2 Wash. St. 155.

<sup>231</sup> *Tacoma Railway, etc., Co. v. Cummings*, 5 Wash. St. 206.

<sup>232</sup> *Bostwick v. Knight*, 5 Dak. 305.

<sup>233</sup> *Com. Nat. Bank v. Smith*, 1 S. Dak. 28.



tory injunction, made at chambers and in vacation;<sup>234</sup> order refusing to modify a judgment;<sup>235</sup> order vacating an order reinstating a case;<sup>236</sup> and no appeal will lie from an order dismissing an appeal from Justice's Court.<sup>237</sup>

§ 4986. **Time in which to appeal.** An appeal may be taken: 1. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one year after the entry of judgment. But an exception to the decision or verdict, on the ground that it is not supported by the evidence, can not be reviewed on an appeal from the judgment unless the appeal is taken in sixty days after the rendition of the judgment.<sup>238</sup> The one year commences to run from the time the judgment is rendered by the court, and not from the time it is entered in the judgment-book by the clerk;<sup>239</sup> from the time it is announced by the court and entered in the minutes.<sup>240</sup> The right of appeal depends upon the rendition, not the entry of judgment.<sup>241</sup> The modification of a judgment made as the result of a motion for new trial is in effect the rendition of a new judgment, and a party thereto may appeal at any time within one year thereafter from the judgment.<sup>242</sup> The pendency of an appeal from an order denying a motion for new trial does not, however, prolong the time for appealing from the judgment.<sup>243</sup>

The Supreme Court can not enlarge the time fixed by statute.<sup>244</sup> In *Humphrey v. Chamberlain*, 11 N. Y. 274, it is de-

<sup>234</sup> *Hadley v. Ulrich*, 1 Okl. 380.

<sup>235</sup> *Swain v. Burnette*, 89 Cal. 564.

<sup>236</sup> *Wheeler v. Garrett*, 13 Col. 140.

<sup>237</sup> *In re Weber*, 4 N. Dak. 119.

<sup>238</sup> Cal. Code Civ. Pro., § 939; *Waggenhelm v. Hook*, 25 Cal. 216; 85 Am. Dec. 125; *Gray v. Palmer*, 28 Cal. 416; *Halleck v. Jaudin*, 34 id. 167; *Bates v. Gage*, 49 id. 126; *Brooks v. Railway Co.*, 110 id. 173; *Fatjo v. Swasey*, 111 id. 628; *Secord v. Quigley*, 106 id. 149; *Mogk v. Peterson*, 75 id. 496.

<sup>239</sup> *Gray v. Palmer*, 28 Cal. 416; *Peck v. Courtis*, 31 id. 207; *Genella v. Relyea*, 32 id. 159; *Hall v. Beggs*, 17 La. Ann. 238.

<sup>240</sup> *Wetherbee v. Dunn*, 36 Cal. 249; *Webster v. Cook*, 38 id. 424; *McCourtney v. Fortune*, 42 id. 387.

<sup>241</sup> Cal. St. Pel. Co. v. *Patterson*, 1 Nev. 151.

<sup>242</sup> *Mann v. Haley*, 45 Cal. 64.

<sup>243</sup> *Bornheimer v. Baldwin*, 42 Cal. 27.

<sup>244</sup> See Cal. Code Civ. Pro., § 1054; *Roush v. Van Hagen*, 17 Cal. 122; *Bay v. Van Rensselaer*, 1 Palge, 423; *Jackson v. Wiseburn*, 5 Wend. 136; *Dooling v. Moore*, 20 Cal. 142; *Gimmy v. Doane*, 22 id.

cided that that power can not be exercised directly or indirectly, either by amendment or otherwise, and that a stay of proceedings does not extend time for appeal.<sup>245</sup> It appears that in New York notice of the order should in all cases be given before the time for appeal commences to run.<sup>246</sup> On appeal from the judgment, the time runs from the filing of the judgment-roll.<sup>247</sup> Such notice can not be given by anticipation, nor till judgment has been perfected by filing the judgment-roll, or by entry or filing of the order in a special proceeding or after judgment rendered.<sup>248</sup> An appeal must be taken: 2. From a judgment rendered on an appeal from an inferior court, within ninety days after the entry of such judgment.<sup>249</sup> So from a judgment of a County Court, rendered on appeal from a Justice's Court,<sup>250</sup> in cases of law. But it may be taken on the same day that judgment is entered.<sup>251</sup> An appeal perfected on the same day of the filing of the judgment-roll, but before the hour when the roll was filed, is nevertheless regular. The law does not regard fractions of a day, except to prevent injustice.<sup>252</sup> But where any steps have been taken in good faith, the court has power under the statute to allow an amendment *nunc pro tunc* to supply the defect.<sup>253</sup> After appealing from a judgment

635; *Gray v. Palmer*, 28 id. 416; *Peck v. Courtis*, 31 id. 207; *Genella v. Relyea*, 32 id. 159; *Walt v. Van Allen*, 22 N. Y. 319.

<sup>245</sup> *Gallt v. Finch*, 24 How. Pr. 193; *Morris v. Morange*, 26 id. 247; *Salls v. Butler*, 27 id. 133. The period fixed by the statute is an express and peremptory limitation of time within which the appeal must be taken, and is not a flexible rule to be varied by extrinsic circumstances. *Henry v. Merguire*, 111 Cal. 1. A suit is suspended during the period between the death of the plaintiff and the order granting a continuance, and this period is not to be deemed any part of the time limited for taking an appeal. *Dick v. Kendall*, 6 Oreg. 166; *McBride v. Railroad Co.*, 19 id. 64. The limitation as to time of appeal can not be waived by parties to a suit. *Cogswell v. Hogan*, 1 Wash. St. 4.

<sup>246</sup> Code 1877, § 1325.

<sup>247</sup> Id.

<sup>248</sup> *Fry v. Bennett*, 16 How. Pr. 385; see § 5047, *post*.

<sup>249</sup> Cal. Code Civ. Pro., § 939. Under Colorado practice, the appeal must be prayed within five days from the rendition of the judgment. *Lindlinger v. Jewell*, 1 Col. App. 340; *Live Stock Co. v. Godding*, 20 Col. 71.

<sup>250</sup> *Dooling v. Moore*, 20 Cal. 141.

<sup>251</sup> *Blydenburg v. Cotheal*, 5 How. Pr. 200; *Jones v. Porter*, 6 id. 286.

<sup>252</sup> *Clute v. Clute*, 3 Den. 263; *Blydenburg v. Cotheal*, 4 N. Y. 418.

<sup>253</sup> *Fry v. Bennett*, 7 Abb. Pr. 352; *Haase v. N. Y. Cent. R. R. Co.*, 1 How. Pr. 430; *Sherman v. Wells*, id. 522.

alone, a party may appeal from an order refusing a new trial within the statute time.<sup>254</sup> But if an appeal be taken in the same notice from both the final judgment and the order refusing a new trial, after sixty days from the entry of the order, the appeal from the order will be dismissed.<sup>255</sup> A party neglected to appeal from an order vacating a judgment in his favor, but nearly a year after it was made, moved to set it aside, and appealed from the order denying that motion; it was held that the appeal would not lie, as it would be a palpable evasion of the statute limiting the time for appeals from orders.<sup>256</sup> A motion to set aside a judgment for irregularity does not suspend the time for appealing.<sup>257</sup>

An appeal may be taken: 3. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order refusing to grant or dissolve an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment; and from an interlocutory judgment in actions for partition of real property, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk.<sup>258</sup> So for refusing a new trial.<sup>259</sup> So also for refusing to vacate an award on certain grounds specified in the motion,<sup>260</sup> after the motion is made and entered in the minutes of the court.<sup>261</sup>

§ 4986a. **The same — continued.** The failure to take an appeal in time goes to the jurisdiction.<sup>262</sup> If not taken within the time prescribed by statute it will be dismissed;<sup>263</sup> unless a reason-

<sup>254</sup> *Marzlou v. Ploche*, 8 Cal. 522; *Carpentier v. Williamson*, 25 id. 154. Appeal from order refusing a new trial may be taken before the judgment is entered. *Schroeder v. Schmidt*, 71 Cal. 390.

<sup>255</sup> *Lower v. Knox*, 10 Cal. 480.

<sup>256</sup> *Von Steemoyck v. Miller*, 18 Wis. 320.

<sup>257</sup> *Renoull v. Harris*, 2 Sandf. 641; S. C., 2 Code Rep. 71.

<sup>258</sup> Cal. Code Civ. Pro., § 939, subd. 3.

<sup>259</sup> *Brown v. Tolles*, 7 Cal. 398; *Towdy v. Ellis*, 22 id. 651; *Waggenheim v. Hook*, 35 id. 216. Appealable orders. See § 4985a, *ante*.

<sup>260</sup> *Fairchild v. Daten*, 38 Cal. 286.

<sup>261</sup> *Peck v. Vandenberg*, 30 Cal. 11; *Hihn v. Peck*, id. 280; *Peck v. Courtis*, 31 id. 207.

<sup>262</sup> *Estate of Fisher*, 75 Cal. 523.

<sup>263</sup> *Harvey v. Walt*, 10 Oreg. 117; *Griswold v. Ryan*, 2 Mont. 47; *Borderre v. Den*, 106 Cal. 594; *Langan v. Langan*, 89 id. 186; *Gruell v. Spooner*, 71 id. 493.

able excuse is shown for the failure.<sup>264</sup> An appeal taken prematurely is abortive;<sup>265</sup> and an appeal from a judgment prior to its entry is held to be premature.<sup>266</sup> The rights of parties in respect to an appeal are determined by the date of the actual entry of the judgment, and they can not be affected by the entry of the judgment *nunc pro tunc* as of a prior date.<sup>267</sup> An appeal from a judgment or order in probate proceedings, if not taken within sixty days after the entry of such judgment or order, is not taken in time, and will be dismissed.<sup>268</sup> So of appeals from orders generally.<sup>269</sup> An appeal from an order granting a new trial operates to suspend the functions of the order, and leaves the judgment subsisting, for the purposes of an appeal therefrom, pending the order. And the time between the making of the order and the reversal thereof upon appeal can not be excluded from the computation of time within which an appeal must be taken from the judgment.<sup>270</sup>

§ 4987. **Who may appeal.** Any party aggrieved may appeal in the cases prescribed in the title on appeals.<sup>271</sup> The party appealing is known as the appellant, and the adverse party as the respondent.<sup>272</sup> "By any party" is to be understood any person who is a party to the action.<sup>273</sup> Nor can a party appeal

<sup>264</sup> *Murphy v. Ross*, 2 Wash. St. 327.

<sup>265</sup> *Home for Inebriates v. Kaplan*, 84 Cal. 486.

<sup>266</sup> *Id.*; *Onderdonk v. San Francisco*, 75 Cal. 534; *Kimple v. Conway*, 69 *id.* 71; see, also, *Sweet v. Merkl*, 27 Ill. App. 245; *Lodge v. Twell*, 135 U. S. 232; *Gramm v. Fisher*, 3 Wyo. 595; § 4945, *ante*.

<sup>267</sup> *Ooon v. Grand Lodge*, 76 Cal. 354; and see *Burbank v. Rivers*, 20 Nev. 159; compare *Coward v. Clauton*, 79 *id.* 23.

<sup>268</sup> *Estate of Heldt*, 98 Cal. 553; *Estate of Wlard*, 83 *id.* 619; *Estate of Fisher*, 75 *id.* 523; *Estate of Crowey*, 71 *id.* 300; *Estate of Backus*, 95 *id.* 671; *Estate of Westerfield*, 96 *id.* 113; *In re Grider*, 81 *id.* 571; compare *Estate of Levinson*, 108 *id.* 450.

<sup>269</sup> See Ill., etc., *Bank v. Railway Co.*, 99 Cal. 407; *Flagg v. Puterbaugh*, 101 *id.* 583; *Symons v. Bunnell*, 101 *id.* 223; *Turner v. Reynolds*, 81 *id.* 214; *Barham v. Hostetter*, 67 *id.* 272; *Henshaw v. Palmer*, 59 *id.* 314; *Weinrich v. Porteus*, 12 Nev. 102. An appeal from an interlocutory decree in partition will be dismissed if not taken within sixty days. *Watson v. Sutro*, 77 Cal. 609.

<sup>270</sup> *Henry v. Merguire*, 111 Cal. 1

<sup>271</sup> Cal. Code Civ. Pro., § 938.

<sup>272</sup> *Id.* It is settled California practice not to transpose the names of the parties when the defendant appeals. *Peregoy v. Sellick*, 79 Cal. 568.

<sup>273</sup> *Senter v. De Bernal*, 38 Cal. 640.

unless he is aggrieved by the decision — that is, if he has no interest prejudiced thereby.<sup>274</sup> A party who recovered judgment and assigned it before the commencement of an action to enjoin the collection of the same can not be heard.<sup>275</sup> One who is not a party to the record can not appeal from an order granting a writ of assistance, but he may move to vacate the writ, and thus get on the record, and if his motion is denied, can appeal from the order denying it.<sup>276</sup> If in a suit against a party alleged to be the owner of real estate, and against the real estate, to recover delinquent taxes, judgment is rendered in favor of such party, and against the real estate, he has no ground for appeal, his answer having averred that he did not own the real estate at the time it was assessed.<sup>277</sup> As to who is the party aggrieved, the test is found in the question, "Would the party have had the thing if the erroneous judgment had not been given?" — if yea, then he is the party aggrieved.<sup>278</sup> Every party whose interest in the subject-matter of the appeal is adverse, or will be affected by the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an "adverse party."<sup>279</sup> A subsequent incumbrancer can not object to a judgment of foreclosure rendered against the mortgagor and himself, unless he shows that he will sustain injury from it.<sup>280</sup>

§ 4988. **Joint appeal.** All parties pleading jointly may join in appeal from decision on their pleading, though review is sought on a point available to one only.<sup>281</sup> Less than all the de-

<sup>274</sup> *Id.*; *Foster v. Prince*, 8 Abb. Pr. 407; *Idley v. Bowen*, 11 Wend. 227; *Reid v. Vanderheyden*, 5 Cow. 719; *Kelly v. Israel*, 11 Paige, 147; *Hughes v. Stickney*, 13 Wend. 280; *Fairbanks v. Corlies*, 3 E. D. Smith, 582; *People v. Wilson*, 36 Cal. 127; *Rankin v. Railroad Co.*, 73 *id.* 96; *Calderwood v. Brooks*, 28 *id.* 153.

<sup>275</sup> *Hobbs v. Duff*, 43 Cal. 486.

<sup>276</sup> *People v. Grant*, 45 Cal. 97.

<sup>277</sup> *People v. Wilson*, 26 Cal. 127.

<sup>278</sup> *Adams v. Woods*, 8 Cal. 306; see *Blythe v. Ayres*, 102 *id.* 260; *People v. Pfeiffer*, 59 *id.* 89.

<sup>279</sup> *Senter v. Bernal*, 38 Cal. 640; *Ely v. Frisbie*, 17 *id.* 250; *Cotes v. Carroll*, 28 How. Pr. 436; see *Jones v. Quantrell*, 2 Idaho, 141; *The Victorian*, 24 Oreg. 121; *Lillenthal v. Caravita*, 15 *id.* 339; *Green v. Berge*, 105 Cal. 56, quoting *Thompson v. Ellsworth*, 1 Barb. Ch. 627. Who not "adverse parties." *Hinkel v. Donohue*, 88 Cal. 597; see *Jackson County v. Bloomer*, 28 Oreg. 110.

<sup>280</sup> *Mann v. Thayer*, 18 Wis. 479.

<sup>281</sup> *Bank of Cooperstown v. Corlies*, 1 Abb. Pr. (N. S.) 412. Separate creditors of an insolvent who have a common interest in

fendants in a joint decree can not appeal without a summons and severance in the court below.<sup>282</sup> From the interlocutory judgment upon such issue appeals may be taken by the party aggrieved, without making any persons parties to the appeal except such as were parties to the issue; but no appeal from the whole of the final judgment can be made effectual unless all of the parties to it are made parties to the appeal, either as appellants or respondents; for such a judgment can not be reversed without affecting the interest of all who are parties to it.<sup>283</sup>

§ 4989. **Parties to the record.** No persons but those who are parties to the record can be permitted to be heard on an appeal,<sup>284</sup> except a purchaser at a judicial sale.<sup>285</sup> A subsequent lienholder may appeal from a direction in a foreclosure decree

the reversal or modification of a decree as to the mode of payment of their claims, and who are all aggrieved in the same way and by the same portion of the decree, may prosecute a joint appeal from the decree. *In re* Cal. Mut. L. Ins. Co., 81 Cal. 364. Under Colorado statute (Laws 1889, p. 77), a joint appeal is not maintainable unless each appellant is entitled to an appeal. *Diamond, etc., Min. Co. v. Faulkner*, 14 Col. 438.

<sup>282</sup> *Mussina v. Cavoza*, 20 How. (U. S.) 280; *Smith v. Clark*, 12 id. 21.

<sup>283</sup> *Senter v. Bernal*, 38 Cal. 640. All parties to a judgment or decree, whose interests may be substantially affected by the adjudication of the appellate court must be included in the appeal, otherwise such court is without jurisdiction. *Hamilton v. Blair*, 23 Oreg. 64; and see *Oline v. Mitchell*, 1 Wash St. 24. Who may appeal from orders and decrees in probate. See *Merrifield v. Longmire*, 66 Cal. 180; *Kerns v. Dean*, 77 id. 555; *Estate of Noah*, 88 id. 468; *Norton v. Walsh*, 94 id. 564; *Ex parte Oxford*, 102 id. 656; *Blythe v. Ayres*, id. 254; *Estate of Blythe*, 108 id. 124. Wherever an order or decree involves a construction of the proper exercise of the duties of a trustee, or presents a question as to the right or power of the trustee to comply with it, or wherever obedience to it might subject him to liability, even where the order is one merely for the payment of funds, the trustee may appeal therefrom. *Estate of Welch*, 106 Cal. 427.

<sup>284</sup> Id.; *Harrison v. Nixon*, 9 Pet. 483; *Fish v. Johnson*, 16 La. Ann. 29; *In re Bristol*, 16 Abb. Pr. 397; *E. B. v. E. C. B.*, 28 Barb. 299; *People v. Lynch*, 54 N. Y. 661; *Gulon v. Insurance Co.*, 109 U. S. 173; *Fischer v. Hanna*, 21 Col. 9. And the judgment appealed from must be against the party appealing. Id. Sureties on an injunction bond, not being parties to the action, can not participate in a review of the proceedings. *Carson Mining Co. v. Hill*, 7 Col. App. 141.

<sup>285</sup> *Delaplaine v. Lawrence*, 10 Paige, 602; *Bailey v. Maule*, 7 Cl. & Fin. 121; *Mortimer v. Nash*, 17 Abb. Pr. 229.

ordering the sale of mortgaged property for gold coin only.<sup>286</sup> A defendant who neither answered nor appeared at any stage of the proceedings, for the purpose of contesting any step taken against him, can not appeal.<sup>287</sup> Where some of several defendants make default and others answer, the defaulting defendants may appeal.<sup>288</sup> A party in whose favor a decision is made, if injured thereby, may appeal therefrom.<sup>289</sup> Third persons not interested in the suit should not be made parties on appeal.<sup>290</sup> That the appellant has no interest in the decree from which he appeals can not be allowed to defeat the appeal.<sup>291</sup>

§ 4990. **Right of appeal.** The fact that a decree sought to be appealed from has been executed does not deprive the party of his right of appeal.<sup>292</sup> Notice of entry of judgment, served before costs are finally adjusted, does not have the effect to limit the right of appeal.<sup>293</sup> The right of appeal must be governed by the laws in force at the time the appeal is taken.<sup>294</sup> The fact that parties to an action were citizens of different states does not authorize an appeal to the Supreme Court of the United States after decision by the Supreme Court of the state.<sup>295</sup> Residence out of the state for several years is no ground for denying the right to appeal.<sup>296</sup> Counsel opposing a motion to dismiss an action for want of prosecution, by stating that sooner than comply with the order to amend previously made, they would allow the complaint to be dismissed, and present the case on appeal, do not thereby waive the right to appeal.<sup>297</sup> The voluntary acceptance of costs imposed as a condition to granting a motion for new trial is not a waiver of the right to an

<sup>286</sup> *Miller v. Cherry*, 2 Nev. 165.

<sup>287</sup> *Sands v. Hildreth*, 12 Johns. 493; *Colden v. Knickerbacker*, 2 Cow. 31; *Kane v. Whittick*, 8 Wend. 219; *Murphy v. American Life Ins. & Trust Co.*, 25 id. 249.

<sup>288</sup> *Giminy v. Doane*, 22 Cal. 635.

<sup>289</sup> *Parker v. Newland*, 1 Hill, 87.

<sup>290</sup> *Patten v. Powell*, 16 La. Ann. 128. So in equity. *Thompson v. Cox*, 8 Jones L. 311.

<sup>291</sup> *Ricketson v. Compton*, 23 Cal. 636.

<sup>292</sup> *Peer v. Cookerow*, 1 McCarter, 361.

<sup>293</sup> *Champion v. Plymouth Society*, 42 Barb. 441.

<sup>294</sup> *Hamilton v. Kneeland*, 1 Nev. 60; see § 4938, *ante*.

<sup>295</sup> *Hamilton v. Kneeland*, 1 Nev. 60.

<sup>296</sup> *Ricketson v. Compton*, 23 Cal. 637.

<sup>297</sup> *Lahens v. Fielden*, 15 Abb. Pr. 177.



appeal.<sup>298</sup> Where all the defendants will not join in an appeal, the appellant must summon the others and sever from them.<sup>299</sup> The maker of a promissory note can bring an appeal from a judgment against himself and indorser jointly.<sup>300</sup> A married woman, assisted and authorized by her husband in bringing the suit, must join him on the appeal.<sup>301</sup>

§ 4991. *Separate appeal.* Any one of several parties, even upon the same side, may appeal without the concurrence of his coparties;<sup>302</sup> or he may appeal for them all, but can not afterwards withdraw his appeal as to his codefendants.<sup>303</sup> In cases of maritime tort against two respondents, if they do not assume a joint defense, each may appeal separate from the other.<sup>304</sup> Where a judgment is not appealed from by one party, an error in favor of the other can not be corrected.<sup>305</sup>

§ 4992. *Substituted party.* Upon the death or disability of a party pending an appeal, his representative shall be substituted in the suit, by suggestion in writing to the court on the part of such representative, or of any party on the record.<sup>306</sup> The

<sup>298</sup> *Tyson v. Wells*, 1 Cal. 378; *Champion v. Plymouth Society*, 42 Barb. 441.

<sup>299</sup> *Perry v. Block*, 1 Mo. 484.

<sup>300</sup> *Morgner v. Birkhead*, 34 Mo. 214.

<sup>301</sup> *Reese v. Conyers*, 16 La. Ann. 39.

<sup>302</sup> *Mattison v. Jones*, 9 How. Pr. 152; *Giraud v. Beach*, 4 E. D. Smith, 27; overruling *Farrell v. Calkins*, 10 Barb. 348; see, also, *Peer v. Cookerow*, 1 McCarter, 361.

<sup>303</sup> *Bonner v. Campbell*, 48 Penn. St. 286.

<sup>304</sup> *Thomas v. Lane*, 2 Sumn. 1. So in equity. *Forgay v. Conrad*, 6 How. (U. S.) 201.

<sup>305</sup> *Delassus v. Poston*, 19 Mo. 425. On an appeal by one of several defendants, defects in the complaint which only affect the rights of the defendants not appealing, will not be considered. *Ball v. Nichols*, 73 Cal. 193. And failure of one appellant to perfect his appeal will not affect the rights of another appellant who has perfected the appeal on his part. *Kelley v. Kitsop County*, 5 Wash. St. 521. The fact that causes were consolidated by order of the court below, upon consent of counsel, will not entitle them to be considered together upon appeal, if there were separate motions for new trials, separate bills of exceptions, and separate appeals, in each cause, and each is presented to the appellate court upon its own record. *Harmon v. Railroad Co.*, 86 Cal. 617.

<sup>306</sup> Rule 14, Sup. Ct. of Cal.; *Beach v. Gregory*, 2 Abb. Pr. 203; *Miller v. Gunn*, 7 How. Pr. 159; *Hastings v. McKinley*, 8 id. 175; and see *Lumber Co. v. Gottschalk*, 81 Cal. 641; *Strong v. Eldridge*, 8 Wash. St. 595; *Moyle v. Landers*, 78 Cal. 99.



death of an appellant after argument of his case on appeal does not constitute any ground for delaying a decision, or departing from the ordinary procedure, except as to the entry of judgment, which should be of a day anterior to the appellant's death.<sup>307</sup> The rule is different if the death occurs previous to argument.<sup>308</sup> But where the appellate court, not aware of the appellant's death, rendered judgment of affirmance, upon subsequent suggestion this judgment will be vacated and a judgment of affirmance rendered as of a day previous to the death, *nunc pro tunc*.<sup>309</sup> The death of a party before appeal taken may be shown in the Supreme Court by affidavit. The suggestion may be made in any court and at any stage of the proceedings.<sup>310</sup> The bankruptcy of an appellant, though adjudicated before the appeal, will not prevent its prosecution in his name, nor can the respondents object thereto. The appeal may be prosecuted in the name of the bankrupt or in that of his assignee.<sup>311</sup> A substitution, on the ground of transfer of interest, must be set in motion by the plaintiff or his vendee.<sup>312</sup>

§ 4993. **Appeals, how taken.** There is no distinction as to the mode of taking and perfecting appeals, or as to the effect of them, between cases at law and cases in equity.<sup>313</sup> Three things are necessary to the taking and perfecting an appeal: 1. Filing notice; 2. Service of the same; 3. Filing the undertaking — all within the times limited by statute.<sup>314</sup> The period allowed the respondent to except to the sufficiency of the sureties can not be abridged by error or negligence of the appellant.<sup>315</sup> It is always within the power of the court to extend the time fixed by law for filing papers in a cause, when the ends of jus-

<sup>307</sup> Black v. Shaw, 20 Cal. 68.

<sup>308</sup> Id.

<sup>309</sup> Id.; Saving and Loan Society v. Gibb, 21 id. 609; 82 Am. Dec. 765.

<sup>310</sup> Judson v. Love, 35 Cal. 463; Shartzler v. Love, 40 id. 96; see, also, McCreery v. Everding, 44 id. 284.

<sup>311</sup> O'Neill v. Dougherty, 46 Cal. 575.

<sup>312</sup> Moss v. Shear, 30 Cal. 467; Hestres v. Brennan, 37 id. 388.

<sup>313</sup> Lyons v. Lyons, 18 Cal. 448. The rule as laid down in Walker v. Sedgwick, 5 id. 192, being changed. Under laws of Washington an equity case is reviewable upon the law without the production of a complete record. Howard v. Shaw, 10 Wash. St. 151; see Gilbranson v. Squier, 5 id. 99; Travis v. Ward, 2 id. 30.

<sup>314</sup> Hastings v. Halleck, 10 Cal. 31.

<sup>315</sup> Id.

tice would seem to demand it.<sup>316</sup> But this does not apply to notices and undertakings on appeal.<sup>317</sup> In all cases where an appeal is given by statute, the remedy is exclusive, and must be pursued.<sup>318</sup> A remedy can not be extended beyond the provisions of the statute which gives it, and if the act does not give an appeal, none lies.<sup>319</sup> If the act conferring the jurisdiction expires, the jurisdiction ceases, although the appeal or writ of error be actually pending in the court at the time of the expiration of the act.<sup>320</sup> An appeal may be brought by the state or the people thereof, or any officer thereof, or any county, city, or town, by filing and serving notice of appeal as above, without the filing of a bond or the payment of costs.<sup>321</sup> The court below may, in its discretion, dispense with or limit the security required by the Code on appeal, when the appellant is an executor, administrator, trustee, or other person acting in another's right.<sup>322</sup> A party can not appeal a second time from the same judgment, the first appeal having been dismissed.<sup>323</sup> The rule is otherwise in California. Where an appeal is dismissed for want of a proper bond, and no final judgment has been rendered, an appeal can be taken at any time within the period allowed by law.<sup>324</sup>

**§ 4994. Perfecting appeals.** An appeal is perfected when a proper undertaking, with an affidavit of the sureties, has been executed, and notice of appeal served on the adverse party and the clerk, and from that time proceedings are stayed.<sup>325</sup> Until

<sup>316</sup> *Wood v. Forbes*, 5 Cal. 62.

<sup>317</sup> Cal. Code Civ. Pro., § 1054, as amended by act of 1895.

<sup>318</sup> *Haight v. Gay*, 8 Cal. 297; 68 Am. Dec. 323; see § 4938, *ante*.

<sup>319</sup> *United States v. Nourse*, 6 Pet. 470.

<sup>320</sup> *Butler v. Palmer*, 1 Hill, 328; *Surtees v. Ellison*, 9 Barn. & Cress. 750; 3 Burr. 1456; *Key v. Goodwin*, 4 Moo. & P. 341; *McNulty v. Batty*, 10 How. (U. S.) 72.

<sup>321</sup> See Cal. Code Civ. Pro., § 1058.

<sup>322</sup> *Id.*, § 946; and see *Scheerer v. Edgar*, 67 Cal. 377.

<sup>323</sup> *Brill v. Meek*, 20 Mo. 358.

<sup>324</sup> *Martinez v. Gallardo*, 5 Cal. 155; see *Dooling v. Moore*, 19 *id.* 81; *Gordon v. Wansey*, *id.* 82. Where an appeal has been regularly perfected, and is pending in the Supreme Court, a second appeal from the judgment, attempted to be taken by the same party, is a nullity, and will be dismissed. *Brown v. Plummer*, 70 Cal. 337.

<sup>325</sup> *Ford v. Thompson*, 19 Cal. 118; *Pierson v. McCahill*, 23 *id.* 250; *Thompson v. Blanchard*, 2 N. Y. 561; *Straat v. Blanchard*, 14 Col. 445. The time when an appeal shall be deemed perfected is not

an appeal is taken, there is nothing to give effect to an undertaking.<sup>826</sup> Perfecting an appeal does not release the lien acquired by docketing the judgment,<sup>827</sup> unless the enforcement of the judgment be stayed by a proper bond.<sup>828</sup>

**§ 4995. Effect of appeal.** It is also provided by statute that when the appeal is perfected, as prescribed in the preceding sections, it stays all further proceedings in the court below, upon the judgment or order appealed from, or upon the matters embraced therein, and releases from levy property which has been levied upon under execution issued upon such judgment; but the court below may proceed upon any other matter embraced in the action, and not affected by the order appealed from.<sup>829</sup> And such is the effect in all cases not otherwise specially provided for. It applies to an order granting a new trial;<sup>830</sup> or upon an order granting an injunction.<sup>831</sup> But it will not dissolve or suspend an injunction.<sup>832</sup> The exception to the general rule in regard to stay of proceedings are, when the judgment or order appealed from directs the sale of perishable property, or where it adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, and also where the order grants or refuses to grant a change of the place of trial of an action.<sup>833</sup> It is an essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted.<sup>834</sup> The taking an

affected in any way by the respondent's filing in the cause a written waiver of all exceptions to the sufficiency of the sureties in the undertaking. *Callahan v. Railroad Co.*, 17 Oreg. 536.

<sup>826</sup> *Buckholder v. Byers*, 10 Cal. 481.

<sup>827</sup> *Low v. Adams*, 6 Cal. 277.

<sup>828</sup> Cal. Code Civ. Pro., § 671.

<sup>829</sup> Cal. Code Civ. Pro., § 946. Upon an appeal which stays proceedings the subject-matter is removed from the jurisdiction of the lower court until the appeal has been determined. *Ruggles v. Superior Ct.*, 103 Cal. 125. But until judgment is entered, the trial court retains complete jurisdiction of an action of which it can not be divested by an unauthorized appeal. *Brady v. Burke*, 90 Cal. 1.

<sup>830</sup> *Ford v. Thompson*, 19 Cal. 118.

<sup>831</sup> *Hoyt v. Gelston*, 13 Johns. 139; *Genni v. Chadsey*, 12 Abb. Pr. 69; *Howe v. Leaving*, 6 Bosw. 684; *Wood v. Dwight*, 7 Johns. Ch. 295; *Hart v. Masons of Albany*, 3 Paige Ch. 381.

<sup>832</sup> *Merced Mining Co. v. Fremont*, 7 Cal. 130; *Hicks v. Michael*, 15 id. 109.

<sup>833</sup> Cal. Code Civ. Pro., § 949.

<sup>834</sup> *Marbury v. Madison*, 1 Cranch, 49.

appeal does not operate to discharge an attachment.<sup>335</sup> In California an appeal does not continue in force an attachment unless an undertaking be executed and filed on the part of the appellant, by at least two sureties, in double the amount of the debt claimed by him, that the appellant will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless within five days after the entry of the order appealed from such appeal be perfected.<sup>336</sup> In New York an appeal with security does not discharge a previous levy.<sup>337</sup> But the court may in its discretion discharge a levy upon motion.<sup>338</sup> In California a bond staying execution releases a levy.<sup>339</sup> An appeal from a decree for an injunction, duly perfected, will suspend proceedings to punish its violation.<sup>340</sup> Where the decree merely directs certain payments to be made, it is sufficient as a stay of proceedings.<sup>341</sup> The stay of proceedings derived from taking an appeal does not prevent a filing of the transcript previously procured.<sup>342</sup> It does not prevent the party who by the judgment appealed from was declared to be entitled to the office from proceeding to compel the delivery of books and papers to him.<sup>343</sup>

<sup>335</sup> *Spencer v. Rogers Locomotive Works*, 13 Abb. Pr. 180.

<sup>336</sup> Cal. Code Civ. Pro., § 946.

<sup>337</sup> *Stricker v. Wakeman*, 13 Abb. Pr. 85; *Smith v. Allen*, 2 E. D. Smith, 239.

<sup>338</sup> Code 1877, § 1311; *Stricker v. Wakeman*, 13 Abb. Pr. 85.

<sup>339</sup> Code Civ. Pro., § 946. Prior to 1874 it was otherwise. See *Ewing v. Jacobs*, 49 Cal. 72.

<sup>340</sup> *Howe v. Searing*, 6 Bosw. 684; see *Swift v. Shepard*, 64 Cal. 423; *Heinlen v. Cross*, 63 id. 44; *Mining Co. v. Mining Co.*, 5 Utah, 151; *Slaughter-House Cases*, 10 Wall. 273; *Dewey v. Superior Court*, 81 Cal. 64. As a general rule, an injunction is not dissolved or suspended by an appeal. But where the judgment commands or permits some act to be done, the proceedings are stayed by the perfecting of an appeal, as to all affirmative action looking to the execution of the terms of the decree. *Stewart v. Superior Court*, 100 Cal. 543. As to the effect of appeal from an order of reference, see *Smith v. Pollock*, 2 Cal. 92. From an order confirming a survey of a Mexican grant. *Thornton v. Mahoney*, 24 Cal. 569. But as to its effect as a stay generally, see *Tiers v. Carnahan*, 3 Abb. Pr. 69.

<sup>341</sup> *Curtis v. Leavitt*, 10 How. Pr. 481.

<sup>342</sup> *Bulkeley v. Keteltas*, 3 Sandf. 740.

<sup>343</sup> *Welch v. Cook*, 7 How. Pr. 282.

**§ 4996. Notice of appeal.**

*Form No. 1158.*

[TITLE.]

Please take notice that the [plaintiff] in the above-entitled action hereby appeals to the Supreme Court of this state, from the [judgment] therein made and entered, in the said Superior Court, on the ..... day of ....., 18.., in favor of the [defendant] in said action, and against said [plaintiff], and from the whole thereof.

[DATE.]

[SIGNATURE.]

To the clerk of said Superior Court, and to E. D., attorney for C. G.

**§ 4997. Amendment of notice.** A notice, when served, is amendable in respect of defects which do not destroy its substantial character.<sup>344</sup> And mere formal errors may be disregarded.<sup>345</sup> But a notice can not be amended so as to include an order or judgment not in the original notice.<sup>346</sup> An oral notice can not be amended.<sup>347</sup> When there is a failure to give in good faith notice of appeal, no amendment can be allowed.<sup>348</sup>

**§ 4998. Filing notice.** In California a notice of appeal given before July 1, 1874, was required to be filed on the same day it was served.<sup>349</sup> The amendments to section 940 of the Code of Civil Procedure, if it changed the rule in this respect, did not take effect until July 1, 1874.<sup>350</sup> Formerly the filing of the notice was required to precede the service of it, or be contemporaneous with it, but the order of service is now immaterial.<sup>351</sup> Where a notice of appeal is filed one day before expiration

<sup>344</sup> Fry v. Bennett, 16 How. Pr. 385; see § 4449, *ante*.

<sup>345</sup> People v. Tarbell, 17 How. Pr. 120; Sherman v. Wells, 14 id. 522, 526.

<sup>346</sup> Fry v. Bennett, 16 How. Pr. 385; Bryant v. Bryant, 4 Abb. Pr. (N. S.) 138; and see Whitby v. Leeds, 27 How. Pr. 378.

<sup>347</sup> People v. Eldridge, 7 How. Pr. 108.

<sup>348</sup> Id.; Cotes v. Carroll, 28 How. Pr. 436.

<sup>349</sup> Dinan v. Stewart, 48 Cal. 567.

<sup>350</sup> Id.

<sup>351</sup> See Code Civ. Pro., § 940; Galloway v. Rouse, 63 Cal. 280; Hewes v. Carville, 62 id. 516. When notice is filed on the day on which judgment is entered, the appeal is not premature, although the notice was served on the preceding day. Tyrrell v. Baldwin, 72 id. 192; see Spokane Falls v. Browne, 3 Wash. St. 84; Dwyer v. Schlumpf, 6 id. 25.

of time limited for taking an appeal, but the undertaking is not filed until three days after the expiration of that time, but within five days after filing notice of appeal, it was held that the appeal was taken in time.<sup>352</sup> Where a notice of appeal to the Circuit Court from an appraisal of lands was informally served, and afterwards filed with the clerk of the railroad company, and he was made acquainted with its contents, it was not error for the court to refuse to dismiss the appeal on that ground.<sup>353</sup>

§ 4999. **Filing and serving notice.** An appeal is made by filing and serving the notice. Both requisites must exist to complete the appeal,<sup>354</sup> and must be within the time prescribed by law<sup>355</sup> to give jurisdiction to the appellate court.<sup>356</sup> The omission of serving the notice of appeal on the clerk within the time limited therefor can not be rectified.<sup>357</sup> The fact that the party to be served is absent from the state does not dispense with service.<sup>358</sup> Where notice of appeal and undertaking were filed in the clerk's office on the same day, and on the next day a copy of the notice was served on the respondent, who, within five days after filing the undertaking, excepted to the sufficiency of the sureties, it was held that respondent was not injured by failure to serve copy of notice on the day the undertaking was filed.<sup>359</sup>

<sup>352</sup> *Peran v. Monroe*, 1 Nev. 484.

<sup>353</sup> *Black v. Chicago R. R. Co.*, 18 Wis. 208.

<sup>354</sup> *Whipley v. Mills*, 9 Cal. 641; *Lambert v. Moore*, 1 Nev. 344; *People v. Eldridge*, 7 How. Pr. 108.

<sup>355</sup> *Hastings v. Halleck*, 10 Cal. 31; see, also, *Dalzell v. Superior Court*, 67 id. 453; *In re Eyres*, 6 Wash. St. 132; *Parker v. Denny*, 2 Wash. Ter. 360. The statutory provision (Cal. Code Civ. Pro., § 1013), extending the time in which acts may be done in certain cases, has no application to the service of a notice of appeal. *Brown v. Green*, 65 Cal. 221.

<sup>356</sup> *Bonds v. Hickman*, 20 Cal. 460; *Bell v. Holford*, 1 Duer, 58; see, also, *De Pedrorena v. Hotchkiss*, 95 Cal. 636.

<sup>357</sup> *Morris v. Morange*, 26 How. Pr. 247; *Elsworth v. Fulton*, 24 id. 20; *People v. Eldridge*, 7 id. 108. Necessity of service of notice of appeal upon the clerk of the court where the judgment was entered. See *Territory v. Hanna*, 5 Mont. 246. It is not competent for the parties to waive notice of appeal. *Sawtelle v. Weymouth*, 14 Wash. St. 21.

<sup>358</sup> *Eckstein v. Calderwood*, 46 Cal. 650; see *Silva v. Serpa*, 86 id. 241.

<sup>359</sup> *Mokelumne Hill Co. v. Woodbury*, 10 Cal. 185.

§ 5000. **Proof of service.** Service of notice may be proved by affidavit of a third person.<sup>360</sup> Where such affidavits only disclose that the affiant, who was a third person, mailed a copy of the notice at Santa Cruz, directed to the respondent's attorneys at San Francisco, but did not state that the attorney for whom he acted resided at Santa Cruz, it was held that the affidavit was defective.<sup>361</sup> Affidavit of service on respondent's attorney, if it does not show a personal service, must state that the notice was left in his office with his clerk, or with a person having charge thereof, or that no person was in the office, and that notice was left there in a conspicuous place between the hours of eight in the morning and six o'clock in the afternoon.<sup>362</sup> Where notice has been properly served by personal or substituted service, appellant may, on motion to dismiss appeal, move for leave to supply omitted proof of service; upon leave being granted, he may file in the court below the requisite affidavit or official certificate of service, and a certified copy thereof may be annexed to the record in appellate court.<sup>363</sup> An acknowledgment of service indorsed on the notice as follows: Due service of a copy of the within notice is hereby accepted to have been made this 20th day of February, 1863, is no waiver of an objection that service upon the day mentioned is too late.<sup>364</sup>

§ 5001. **Service, how and when made.** Notice of appeal taken by the people, in a criminal case, must be served on the defendant personally.<sup>365</sup> It must affirmatively appear in the record that a copy of the notice has been served on the adverse party or his attorney.<sup>366</sup> Service upon the opposite attorney is al-

<sup>360</sup> Moore v. Besse, 35 Cal. 186.

<sup>361</sup> Id. Sufficiency of affidavit of service of notice by mail. See Lowrie v. Salz, 75 Cal. 349; Life Ins. Co. v. Shepardson, 76 Id. 376; Perri v. Beaumont, 88 Id. 108.

<sup>362</sup> Doll v. Smith, 32 Cal. 475.

<sup>363</sup> Moore v. Besse, 35 Cal. 186.

<sup>364</sup> Towdy v. Ellis, 22 Cal. 651. Form of acknowledgment of service of notice of appeal held to be sufficient proof of service. See Lillienthal v. Caravita, 15 Oreg. 339. A written acknowledgment of such service by one of the parties is insufficient to authorize the court to assume jurisdiction without proof of the authenticity of the signature. Moffit v. McGrath, 25 Oreg. 478.

<sup>365</sup> People v. Wallace, 23 Cal. 94.

<sup>366</sup> Cal. Code Civ. Pro., § 940; Senter v. Bernal, 38 Cal. 637; Franklin v. Reiner, 8 Id. 340; Hildreth v. Gwinder, 10 Id. 490. The notice of appeal must be served on all parties who would be affected by any order of the appellate court, whether said parties be plaintiffs



ways sufficient,<sup>367</sup> and may be made by mail with its usual incidents, where otherwise admissible.<sup>368</sup> Service of papers upon the clerk of the court by mail is effective only from the date of his actually receiving them.<sup>369</sup> Where a board of supervisors appeals, the notice need not be given by the president of the board or district attorney; notice by the attorney of record is sufficient.<sup>370</sup> A copy of the notice of appeal filed must be served on the opposite party, before or at the time of filing the undertaking.<sup>371</sup> It can not be filed and served after the undertaking is filed.<sup>372</sup> Where the notice has been filed and served after the undertaking is filed, a second appeal may be taken, if in time.<sup>373</sup>

or defendants, or intervenors. *Coffin v. Edgington*, 2 Idaho, 595; see, also, *National Bank v. Hotel Co.*, 4 Wash. St. 642; *Jones v. Sander*, 2 id. 329; *Traders' Bank v. Bokien*, 5 id. 777; *Millikin v. Houghton*, 75 Cal. 539; *Miller v. Richards*, 83 id. 563; *Lancaster v. Maxwell*, 103 id. 67. The fact that a party whose interests are adverse to the appellant has made default does not preclude the necessity of serving such party with notice of appeal. *Moody v. Miller*, 24 Oreg. 179.

<sup>367</sup> *Coulter v. Stark*, 7 Cal. 244. Service on attorney, sufficiency of. See *Butler v. Smith*, 20 Oreg. 126; *Bennett v. Minott*, 28 id. 339; *Wheeler v. Cragin*, 25 id. 602; *Dillon v. Saloude*, 68 Cal. 267; *January v. Superior Court*, 73 id. 537; *Mantle v. Largey*, 15 Mont. 116; *Walker v. Lewis*, 10 Wash. St. 151. If a lawyer appears for himself and as attorney for his wife, service of notice of appeal upon him, directed to both, is a good service. *Howard v. Shaw*, 10 Wash. St. 151. Service on clerk of party absent from state. *Silva v. Serpa*, 86 Cal. 241.

<sup>368</sup> *Dorlan v. Lewis*, 7 How. Pr. 132; *Orittenden v. Adams*, 5 id. 310. Sufficiency of service of the notice by mail. See *Horr v. Aberdeen Packing Co.*, 7 Wash. St. 354; *Life Ins. Co. v. Shepardson*, 76 Cal. 376. The notice need not be deposited in the post-office at any particular place, the only essentials being residence or offices in different places, and a regular mail communication between the place of mailing and the place of destination. *Luck v. Luck*, 83 Cal. 574; overruling *Reed v. Allison*, 61 id. 461; *Murdock v. Clarke*, 73 id. 25; see § 4418. *ante*; *Heinlen v. Heilbron*, 94 id. 636.

<sup>369</sup> *Morris v. Morange*, 26 How. Pr. 247; S. C., 17 Abb. Pr. 86.

<sup>370</sup> *Damrell v. Board of Supervisors of San Joaquin Co.*, 40 Cal. 157.

<sup>371</sup> *Buffendeau v. Edmondson*, 24 Cal. 94.

<sup>372</sup> *Dooling v. Moore*, 19 Cal. 81; *Carpentier v. Williamson*, 24 id. 609; 85 Am. Dec. 84.

<sup>373</sup> *Dooling v. Moore*, *supra*; *Columbet v. Pacheco*, 46 Cal. 650. See, also, as to time of filing notice, *Courtright v. Berkins*, 2 Mont. 404; *Baker v. Eyres*, 6 Wash. St. 132; *Littlejohn v. Miller*, 5 id. 399; *Meuer v. Railway Co.*, 3 S. Dak. 322. A second notice of appeal filed by the appellant pending the consideration of a motion to dismiss his first appeal, already perfected, for failure to file a transcript



§ 5001a. **Service and filing of notice — continued.** Under Washington statute (Laws of 1893, p. 120, § 4), requiring notice of appeal with proof of service to be filed with the clerk of the Superior Court within five days after the service thereof, it is not sufficient to serve a portion only of the respondents and file proof thereof within the statutory time, but service and filing should be made as to all the respondents.<sup>374</sup> Service of notice upon one of two persons, who appear in the suit as partners, is service upon the firm.<sup>375</sup> An absent partner not served with summons and who did not appear in the action, is not an “adverse party” upon whom the notice of appeal must be served.<sup>376</sup> Notice of appeal from an order denying a motion for a new trial need only be served upon the parties to the motion in the court below.<sup>377</sup> So, a notice of appeal from certain portions of an interlocutory decree in partition need only be served on those parties whose rights would be affected by a modification of the portions of the decree appealed from.<sup>378</sup> Where an appellant, in ignorance of the death of the respondent, serves a notice of appeal on the attorney who had appeared for the latter, and the service is accepted by him, the appeal will not be dismissed on a motion made by the attorney who accepted the service, on the ground that the service was void, because made after the death of the respondent.<sup>379</sup> The appellant will be liberal in granting amendments to the proof of service of the notice of appeal which can cause the respondent no injustice, and which will secure to the appellant a hearing on the merits.<sup>380</sup>

§ 5001b. **The same — service on administrator after conviction for felony.** The conviction of an administrator of an estate of a deceased person for the crime of embezzlement does not render him *civilitcr mortuus*, so as to prevent the service of a notice of appeal on him in an action in which he was sued as administrator and judgment rendered in his favor.<sup>381</sup>

within the required time, has no effect. *Reichenbach v. Lewis*, 5 Wash. St. 577.

<sup>374</sup> *Watson v. Pugh*, 9 Wash. St. 665.

<sup>375</sup> *Shirley v. Birch*, 16 Oreg. 1.

<sup>376</sup> *Merced Bank v. Rosenthal*, 99 Cal. 39.

<sup>377</sup> *Watson v. Sutro*, 77 Cal. 609.

<sup>378</sup> *Miller v. Thomas*, 71 Cal. 406; and see *Miller v. Rea*, 71 id. 405; *Roylance v. Hotel Co.*, 74 id. 273.

<sup>379</sup> *Moyle v. Landers*, 75 Cal. 595.

<sup>380</sup> *Perri v. Beaumont*, 88 Cal. 108.

<sup>381</sup> *Brown v. Mann*, 68 Cal. 517.

**521 FROM SUPERIOR COURT TO SUPREME COURT. §§ 5001c-5002**

**§ 5001c. The same — neglect of clerk to make journal entry.** Where written notice of appeal is served and filed within the proper time, the appeal will not be defeated by the failure of the clerk to enter the notice in the journal of the court below.<sup>382</sup>

**§ 5001d. The same — waiver of irregularity.** Where the appellate court has jurisdiction of the subject-matter, a voluntary appearance by the respondent, and taking steps in the cause in the appellate court, is a waiver of a mere irregularity in the service of the notice of appeal.<sup>383</sup>

**§ 5002. Sufficiency of notice.** A notice of appeal from a judgment and from all orders made in the cause is only an appeal from a judgment. It does not sufficiently describe any order.<sup>384</sup> Even when an appeal is taken from a judgment, orders necessarily affecting it must also be appealed from in form.<sup>385</sup> A notice which states that the appeal is taken "from all orders of the District Court made and entered in the action," is insuffi-

<sup>382</sup> *Dahl v. Tibbals*, 5 Wash. St. 259.

<sup>383</sup> *Holden v. Haserodt*, 2 S. Dak. 220; *Railroad Co. v. Mara*, 26 Ohio St. 185; *Hohmann v. Elterman*, 83 Ill. 92.

<sup>384</sup> *Gates v. Walker*, 35 Cal. 289.

<sup>385</sup> *Fry v. Bennett*, 16 How. Pr. 385; *Marqueart v. Lafarge*, 5 Duer, 559. Notices of appeal should be liberally construed, and no appeal should be dismissed because of any misdescription of the judgment or order to which it relates, unless it appears that the respondent has been misled by such misdescriptions. *Meley v. Boulon*, 104 Cal. 262. But this rule does not extend to sustaining a notice of appeal as an appeal from a judgment when it does not state that the appeal is taken from a judgment. *Id.*; and see *Christian v. Evans*, 5 Oreg. 253; *Luse v. Luse*, 9 *id.* 149. A notice which gives the name of the court and of the parties to the action, the date of the judgment, without any other description, and informs or makes known to the respondent that the appellant appeals from the judgment in said action, is held sufficient. *Ream v. Howard*, 19 Oreg. 491. An immaterial mistake or omission will not invalidate the notice, if sufficient in other respects. See *Swasey v. Adair*, 83 Cal. 136; *Weyl v. Railroad Co.*, 69 *id.* 202; *Anderson v. Goff*, 72 *id.* 65; *Herrlich v. McDonald*, *id.* 579; *Butler v. Ashworth*, 100 *id.* 334; *McConnell v. Kaufman*, 4 Wash. St. 229. A notice of appeal describing the order appealed from as one made and entered on a certain day is a sufficient designation of the subject-matter of the appeal when no other order was entered on the day specified. *Gruell v. Spooner*, 71 Cal. 493. Matter in notice treated as surplusage. See *Williams v. Dennison*, 86 Cal. 430; *Sharon v. Sharon*, 68 *id.* 326; *Nev. Cent. R. R. Co. v. District Court*, 21 Nev. 409; *Woodside v. Hewel*, 107 Cal. 141.

cient.<sup>386</sup> A notice appealing from all orders made by a Probate Court in the case, on a certain day, is sufficient.<sup>387</sup> A notice of intention to appeal all parts of the principal case proper is a sufficient notice of intention to appeal the whole case.<sup>388</sup> In forcible entry and detainer, a notice is not invalidated because it contains a clause that the "appeal is taken on questions of law alone."<sup>389</sup> If the record shows that the notice was not served in time, no appeal is pending, and a motion to dismiss will be denied.<sup>390</sup> If the notice is signed by an attorney of the court, the presumption is that he had authority to take such action.<sup>391</sup>

§ 5002a. *The same — continued.* Where an appellant has two attorneys of record in the lower court, or a firm of attorneys, either one of the two, or either member of the firm, may sign the notice of appeal.<sup>392</sup> The notice is not ineffectual because the attorney signing it has not been admitted to practice in the appellate court, provided he is qualified to act as the attorney of record in the court below.<sup>393</sup> Under Oregon practice, a notice of appeal is sufficient, although signed by attorneys who were not the attorneys of the appellant in the court below, and no substitution has been made as the statute provides.<sup>394</sup> Under statute of Washington (Code Pro., § 1405), notice of appeal given orally in open court is sufficient. And where such notice is given and entered, the presumption is that the proper order was given to the clerk, although the record may not state so.<sup>395</sup> But notice of appeal given orally in open court must be given at the time of rendition of judgment in order to be effective.<sup>396</sup> If then so given no other service of notice is necessary.<sup>397</sup> And it is held that notice of appeal in open court within the time allowed by law, but at a term of court subsequent to the term when judg-

<sup>386</sup> *Genella v. Relyea*, 32 Cal. 159.

<sup>387</sup> *Estate of Pacheco*, 29 Cal. 224.

<sup>388</sup> *Branch v. Diek*, 14 Ohio St. 551.

<sup>389</sup> *Zoller v. McDonald*, 23 Cal. 136.

<sup>390</sup> *Harlan v. Pratt*, 50 Cal. 94.

<sup>391</sup> *Ricketson v. Compton*, 23 Cal. 636.

<sup>392</sup> *Cockrill v. Hall*, 76 Cal. 192.

<sup>393</sup> *Beardsley v. Frame*, 73 Cal. 634.

<sup>394</sup> *Shirley v. Birch*, 16 Oreg. 1.

<sup>395</sup> *Town of Elma v. Carney*, 4 Wash. St. 418.

<sup>396</sup> *Ousick v. Beyers*, 5 Wash. St. 98.

<sup>397</sup> *Moore v. Brownfield*, 7 Wash. St. 23; *Seattle v. Liberman*, 9 Id. 276.

ment was rendered, is sufficient, though appellees were not present, nor had notice been served on them to appear.<sup>398</sup>

§ 5003. **Stipulations, effect of.** A stipulation that no execution shall issue until the determination of the appeal is not a waiver of an objection that the notice of appeal was not filed in season.<sup>399</sup> If the attorneys of the parties stipulate in the transcript that notice was filed in the court below and served, the Supreme Court can not receive evidence contradicting the stipulation.<sup>400</sup> The court below, upon proper application, can relieve a party from a mistake of fact in such cases, but the Supreme Court can not.<sup>401</sup> Where the object of a notice of appeal is accomplished, it is immaterial whether the notice of appeal is given or not.<sup>402</sup> Where both parties appear, no notice whatever is necessary to be shown.<sup>403</sup> An admission of due service waives all objections, even that of notice not having been given in due time.<sup>404</sup>

§ 5004. **What to contain.** The notice shall contain a statement of the judgment or order, or the specific part thereof, appealed from.<sup>405</sup> It need not state the grounds of appeal, nor the objections raised;<sup>406</sup> though it has been said it would be better practice to do so.<sup>407</sup> If there is enough in the notice to show that the judgment or order contained in the transcript is the same intended to be appealed from, it will not be dismissed, although it may contain mistakes as to the dates of the order or judgment.<sup>408</sup> A notice stating that defendant appealed from the whole judgment is sufficient notice within the statute.<sup>409</sup>

<sup>398</sup> *McMillan v. Man*, 1 Wash. St. 26.

<sup>399</sup> *Moulton v. Ellmaker*, 30 Cal. 527.

<sup>400</sup> *Bonds v. Hickman*, 29 Cal. 460. An intervenor in a foreclosure suit, having entered into a stipulation which precluded him from being heard until the practical determination of the issues of the case and the sale of the mortgaged property, has no such standing in the case as requires him to be made a party to the appeal under the Oregon statute. *Shirley v. Birch*, 16 Oreg. 1.

<sup>401</sup> *Bonds v. Hickman*, 29 Cal. 460.

<sup>402</sup> *McLeran v. Shartzner*, 5 Cal. 70; 63 Am. Dec. 84.

<sup>403</sup> *Id.*; doubted in *Killip v. Empire Mill, etc., Co.*, 2 Nev. 43.

<sup>404</sup> *Struver v. Ocean Ins. Co.*, 2 Hilt. 475.

<sup>405</sup> Cal. Code Civ. Pro., § 940.

<sup>406</sup> *Wilson v. Allen*, 3 How. Pr. 359.

<sup>407</sup> *Smith v. Grant*, 17 How. Pr. 381.

<sup>408</sup> *Flateau v. Lubeck*, 24 Cal. 364; see § 5002, *ante*.

<sup>409</sup> *Price v. Van Caneghan*, 5 Cal. 124; *Wilson v. Allen*, 3 How. Pr. 372; *People v. Boylston*, 17 *id.* 120.

The place for assignment of error is in the statement, and not in the notice of appeal.<sup>410</sup>

**§ 5005. Undertaking for costs and damages on appeal.**

*Form No. 1159.*

[TITLE.]

Whereas the ..... in the above-entitled action ..... is about to appeal to the Supreme Court of the state of ....., from a ..... entered against ..... in said action, in the said Superior Court, in favor of the ..... in said action, on the ..... day of ....., 18.., for ..... dollars damages, and ..... dollars costs of suit, and .....:

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, ....., of the said county of ....., and ....., of ....., do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against ..... on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

[DATE.]

[SIGNATURES AND SEALS.]

[JUSTIFICATION.]

**§ 5006. Undertaking on appeal staying execution.**

*Form No. 1160.*

[TITLE.]

Whereas the ..... in the above-entitled action ..... appeals to the Supreme Court of the state of ....., from a ..... made and entered against ..... in said action, in the said Superior Court, in favor of the ..... in said action, on the ..... day of ....., 18.., for ..... dollars damages, and ..... dollars costs of suit, and .....:

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, ..... of the said county of ....., and ....., of .....

<sup>410</sup> *Burnett v. Pacheco*, 27 Cal. 409. Under Oregon practice, the general rule is that the notice of appeal in actions at law must specify with reasonable certainty the grounds of error upon which the appellant intends to rely. *Carver v. Jackson Co.*, 22 Oreg. 62; *Thompson v. Life Ins. Co.*, 21 id. 466; *Lumber Co. v. Johnson*, 25 id. 105; *Krewson v. Purdom*, 13 id. 563.

do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against ..... on the appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant ..... desirous of staying the execution of the said ..... so appealed from, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of ..... dollars ....., being double the amount named in the said ....., that if the said ..... appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant shall pay ..... the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal; and that if the appellant .. do .. not make such payment within thirty days after the filing of the *remittitur* from the Supreme Court in the court from which the appeal is taken, judgment may be entered on motion of respondent .. in ..... favor, against the said sureties for such amount, together with the interest that may be due thereon, and the damages and costs that may be awarded against the appellant .. upon the appeal herein.

[DATE.]

[SIGNATURES AND SEALS.]

[JUSTIFICATION.]

**§ 5007. Undertaking on appeal in ejectment.**

*Form No. 1161.*

[TITLE.]

Whereas ....., the ..... in the above-entitled action, has appealed to the Supreme Court of the state of ..... from a ..... made and entered against ..... in the said action, in the said Superior Court, in favor of the ..... in the said action, on the ..... day of ....., 18.., for the recovery of the possession of certain lands and premises therein described, and ..... dollars damages for the detention thereof, and ..... ..dollars costs of suit:

Now, therefore, in consideration of the premises, and of such appeal, we, the undersigned, ....., of the said county of ....., and ....., of the .....,

do hereby jointly and severally undertake and promise, on the part of the appellant, that the said appellant will pay all damages and costs which may be awarded against ..... on the appeal, or on a dismissal thereof, not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellant ..... desirous of staying the execution of the said ..... so appealed from, as to the said costs and damages, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of ..... dollars (being double the amount named in the said ..... for said costs and damages, that if the said ..... appealed from or any part thereof, in that respect be affirmed, the appellant shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellant upon the appeal.

And whereas the appellant ..... desirous of staying the execution of the said ..... so appealed from, in so far as relates to the possession of said land and premises, we do further, in consideration thereof, and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of ..... dollars (being the amount for that purpose fixed by the judge of this court), that during the possession of such property by the appellant, ..... will not commit, or suffer to be committed, any waste thereon, and that if the said ..... appealed from be affirmed, or the appeal dismissed, ..... will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, not exceeding the sum of ..... dollars, so as aforesaid fixed by the judge of this court, by which the said ..... was .....

[DATE.]

[SIGNATURES AND SEALS.]

[JUSTIFICATION.]

§ 5008. Amendments. The omission of the words "to pay to" will not invalidate an appeal bond on appeal from a Justice's Court.<sup>411</sup> Were it otherwise, the court should have given

<sup>411</sup> Billings v. Roadhouse, 5 Cal. 71.



leave to file a new bond.<sup>412</sup> The court has power to allow an amendment to an undertaking, as to technical facts.<sup>413</sup> Defects in justification may, by leave of court, be similarly obviated.<sup>414</sup> Or such defects may be supplied by allowing the filing and service of a new undertaking, *nunc pro tunc*.<sup>415</sup> The Supreme Court can and will, in case of accident or mistake, allow the appellant to substitute a sufficient undertaking for a defective one, even after the five days.<sup>416</sup> But where the defect in justification was of an essential and not of a technical nature, the application for amendments was denied.<sup>417</sup> An undertaking can not be amended in substance, varying the liability of the sureties without their consent.<sup>418</sup>

§ 5009. Amount. The only undertaking required to perfect an appeal is one for the payment of all costs and damages which may be awarded against the appellant, not exceeding three hundred dollars.<sup>419</sup> A deposit of that sum with the clerk of the court in which the judgment or order appealed from was entered fulfills the purpose of the undertaking.<sup>420</sup> But to stay execution of a judgment or order directing the payment of

<sup>412</sup> *Id.*; see, also, *Howard v. Harman*, 5 Cal. 78; *Coulter v. Stark*, 7 id. 244; *Cunningham v. Hopkins*, 8 id. 34; *Frankel v. Stern*, 44 id. 168. In *Langley v. Warner*, 3 How. Pr. 363, the undertaking was to pay all damages, but there was no agreement to pay costs, and it was held that the appeal was not effectual for any purpose, and that the court could not amend such an undertaking without the consent of the parties to it. The contrary was held in *Wilson v. Allen*, 3 How. Pr. 369. The former decision was by the Court of Appeals, the latter by the Supreme Court.

<sup>413</sup> *Marvin v. Marvin*, 11 Abb. Pr. (N. S.) 97; *Beach v. Southworth*, 6 Barb. 173; *People v. Tarbell*, 17 How. Pr. 120.

<sup>414</sup> *Hees v. Snell*, 8 How. Pr. 185.

<sup>415</sup> *Mills v. Thursby* (No. 8), 11 How. Pr. 129; *Tiers v. Carnahan*, 3 Abb. Pr. 69; *Kissam v. Marshall*, 10 id. 424; *Sternhaus v. Schmidt*, 5 id. 66.

<sup>416</sup> *Rabe v. Hamilton*, 18 Cal. 32; but see *Shaw v. Randall*, id. 386. Where an appellant in good faith attempts to comply with an order to file an amended appeal bond, the court in its discretion may enter another order allowing a second amended bond. *McKee v. Mining Co.*, 8 Cal. 392; see § 5015, *post*.

<sup>417</sup> *N. Y. Cent. Ins. Co. v. National Protec. Ins. Co.*, 10 How. Pr. 344; *Cushman v. Martine*, 13 id. 402.

<sup>418</sup> *Langley v. Warner*, 1 N. Y. 606; S. C., 3 How. Pr. 363; *Cobb v. Lackey*, 6 Duer, 649; see N. Y. Code (1877), § 730.

<sup>419</sup> Cal. Code Civ. Pro., § 941.

<sup>420</sup> *Id.*; see *Duncan v. Times-Mirror Co.*, 109 Cal. 602.



money, the undertaking must be in double the amount named in the judgment or order.<sup>421</sup> The amount due on the judgment appealed from must be distinctly stated in the undertaking to form a groundwork for the necessary affidavit of justification.<sup>422</sup> An undertaking on appeal is not invalidated because the sum mentioned exceeds three hundred dollars.<sup>423</sup> If the judgment or order appealed from direct the assignment or delivery of documents or personal property, the undertaking shall be for such amount as the court, or the judge thereof, or the county judge may direct.<sup>424</sup> And it may be for sufficient to provide for the deterioration of the property.<sup>425</sup> Where the court neglects to fix the amount of the appeal bond, appellant may give bond in a sufficient amount.<sup>426</sup> If the judgment or order direct the execution of a conveyance or other instrument, the appeal will not operate as a stay unless the instrument is executed or deposited with the clerk to abide the judgment of the appellate court.<sup>427</sup>

**§ 5010. Consideration.** The stay of proceedings accorded by the statute to the execution of the undertaking is a sufficient consideration.<sup>428</sup> Where the undertaking is pursuant to statute, it need express no consideration on its face.<sup>429</sup> But an undertaking not pursuant to statute, expressing no consideration, and not under seal, is void.<sup>430</sup>

**§ 5011. Deposit in court.** In all cases, a deposit in the court below of the amount of the judgment appealed from, and three hundred dollars in addition, shall be equivalent to filing the undertaking; and in all cases the undertaking or deposit may be waived by the written consent of the respondent.<sup>431</sup>

<sup>421</sup> *Id.*, § 942; see *Boob v. Hall*, 105 Cal. 413; *Duffy v. Greenebaum*, 72 *id.* 157.

<sup>422</sup> *Harris v. Bennett*, 3 Code Rep. 23.

<sup>423</sup> *Zoller v. McDonald*, 23 Cal. 136; *In re Estabrooks*, 5 Cow. 27.

<sup>424</sup> Cal. Code Civ. Pro., § 943.

<sup>425</sup> *Read v. Potter*, 11 Abb. Pr. 413.

<sup>426</sup> *Hubble v. Renick*, 1 Ohio St. 171.

<sup>427</sup> Cal. Code Civ. Pro., § 944.

<sup>428</sup> *Dore v. Covey*, 13 Cal. 502.

<sup>429</sup> *Thompson v. Blanchard*, 3 N. Y. 335; *Seacord v. Morgan*, 17 How. Pr. 394; and see *Powers v. Chabot*, 93 Cal. 266.

<sup>430</sup> *Robert v. O'Donnell*, 10 Abb. Pr. 454.

<sup>431</sup> Cal. Code Civ. Pro., § 948.

§ 5012. **Delivery.** The execution of the paper, delivery to the clerk, filing it among the papers with the affidavit, and the actual suspension of proceedings, is *prima facie* as sufficient proof of delivery, if delivery is essential, as if the undertaking were sealed.<sup>432</sup>

§ 5013. **Exception to sureties.** The adverse party may except to the sufficiency of the sureties within thirty days after filing, and the opposite party has twenty days thereafter to get other sureties, or have the same justified before the judge before whom the cause was tried or before the county clerk.<sup>433</sup> Where the appellant gave notice of the justification on a certain day, during certain hours of the day, respondent has till the last hour specified in which to appear and except.<sup>434</sup> The objection that an undertaking to stay proceedings is insufficient may be waived.<sup>435</sup> So failing to attend at the time and place of justification waives his objection, although the sureties also fail to attend.<sup>436</sup>

§ 5014. **Filing undertaking.** Such undertaking shall be filed, or such deposit made, with the clerk, within five days after the notice of appeal is filed;<sup>437</sup> and the court has no power to extend the time.<sup>438</sup> A failure to comply with the statute will be fatal.<sup>439</sup>

<sup>432</sup> Dore v. Covey, 13 Cal. 502.

<sup>433</sup> Cal. Code Civ. Pro., § 948. Failure of the sureties to justify when excepted to is no ground for dismissing the appeal, but only affects the stay of execution. Swasey v. Adair, 83 Cal. 136.

<sup>434</sup> Lower v. Knox, 10 Cal. 480.

<sup>435</sup> Halsey v. Flint, 15 Abb. Pr. 368; and see Warburton v. Ralph, 9 Wash. St. 537.

<sup>436</sup> Ballard v. Ballard, 18 N. Y. 491.

<sup>437</sup> Cal. Code Civ. Pro., § 940; Merced Mining Co. v. Fremont, 7 Cal. 132; Lambert v. Moore, 1 Nev. 344; Peran v. Monroe, id. 484; Stratton v. Graham, 68 Cal. 168. And after the time for filing an undertaking has expired, the appellant can not withdraw the deposit previously made, and in lieu thereof file an undertaking. Mullen v. Hunt, 67 Cal. 69; Wiebold v. Rauer, 95 id. 418.

<sup>438</sup> Elliott v. Chapman, 15 Cal. 383; affirmed in Shaw v. Randall, id. 384. Under section 1054, Code of Civil Procedure, the time may be extended by the trial court, or the judge thereof, not exceeding thirty days. Wadsworth v. Wadsworth, 74 Cal. 104.

<sup>439</sup> Gordon v. Wansey, 19 Cal. 82; Bellegarde v. Bridge Co., 80 id. 61; Perkins v. Cooper, 87 id. 241. So, in Utah. Cook v. Railway Co., 7 Utah, 416. And Washington. Savage v. Graham, 14 Wash. St. 323. When service of notice of appeal is by mail it is complete at the time of the deposit of a copy in the post-office,

The provisions of a statute in regard to the time within which an act is to be done must not be construed as directory where a consequence is attached to a failure to comply.<sup>440</sup> The undertaking can not be filed before the notice of appeal is filed and served.<sup>441</sup> The time of filing the undertaking relates back to the time of filing and service of notice of appeal.<sup>442</sup> Parties intending to take advantage of the failure to file the requisite undertaking must do so before the case is submitted.<sup>443</sup>

**§ 5015. Filing new undertaking.** Where, on appearance of parties for justification, under exception to sureties, a new undertaking is filed in the place of the old one, the appeal will not be dismissed because the undertaking was not filed within five days after the notice of appeal.<sup>444</sup> No appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of the Supreme Court, be filed in the Supreme Court before the hearing upon motion to dismiss the appeal.<sup>445</sup> In such case, on filing new undertaking in the Supreme Court, approved by one of the justices, the respondent can not require the sureties on the new undertaking to justify.<sup>446</sup>

and the undertaking on appeal must be filed within five days after such deposit. *Brown v. Green*, 65 Cal. 221. When the last day for filing the undertaking falls on Sunday, an undertaking filed on the day following is in time. *Jenness v. Bowen*, 77 Cal. 310. See, also, as to time of filing undertaking, *Brown v. Hanley*, 2 Idaho, 950; *Pardee v. Murray*, 4 Mont. 35; *Northern, etc., T. Co. v. Lowenberg*, 11 Oreg. 286; *Odell v. Godfrey*, 13 id. 469.

<sup>440</sup> *Shaw v. Randall*, 15 Cal. 384; see *Pierce v. Manning*, 1 S. Dak. 306.

<sup>441</sup> *Dooling v. Moore*, 19 Cal. 81; *Carpenter v. Williamson*, 24 id. 609; 85 Am. Dec. 84; *Little v. Jacks*, 68 Cal. 343. Under Washington Appeal Act of 1893, an appeal bond may be filed before the date of the taking of the appeal. *Debenture Co. v. Warren*, 9 Wash. St. 312; see *Dahl v. Tibbals*, 5 id. 259; *Cunyan v. Russell*, 3 id. 665; *Asher v. Sekofsky*, 10 id. 379.

<sup>442</sup> *Peran v. Monroe*, 1 Nev. 484.

<sup>443</sup> *Cook v. Klink*, 8 Cal. 352; *Bryan v. Berry*, id. 130.

<sup>444</sup> *Cummins v. Scott*, 23 Cal. 526.

<sup>445</sup> Cal. Code Civ. Pro., § 954; *Moyle v. Landers*, 78 Cal. 99; see, also, *Coulter v. Stark*, 7 id. 244; *Cunningham v. Hopkins*, 8 id. 34; *Sternhaus v. Schmidt*, 5 Abb. Pr. 66; *Dean v. Hemphill*, Hempst. 154.

<sup>446</sup> *Stevenson v. Steinberg*, 32 Cal. 373. Filing of new undertaking. See *Towle v. Bradley*, 2 S. Dak. 472; *Williams v. Williams*, 19 Col. 19; *Butler v. Ashworth*, 100 Cal. 334; *Payne v. Davis*, 2 Mont. 381; *De Lashmutt v. Sellwood*, 10 Oreg. 51; *Woodman v.*

§ 5016. **Form.** The undertaking may be in one instrument or several, at the option of the appellant.<sup>447</sup> It is not necessary that an appeal bond conform in all respects to the form prescribed by statute.<sup>448</sup> Noncompliance with the directory provisions of the statute intended for the benefit of the respondent does not vitiate the undertaking.<sup>449</sup> A noncompliance with essentials may invalidate an undertaking.<sup>450</sup> The omission of the words "to pay to" will not invalidate the obligation; if it did, leave should be granted to file a good bond.<sup>451</sup> An undertaking given in the form of a penal bond, providing it substantially conform to all the conditions above imposed, is good.<sup>452</sup> Where an instrument purporting to be a bond on appeal contains words of obligation, and has a scroll opposite the name of one of the two signers who contemporaneously verify the instrument as their bond, it is the bond of both.<sup>453</sup> The names and residence of the sureties need not appear in the body of the paper.<sup>454</sup> Residence of sureties and their occupation, and that the penalty must be double the amount of the judgment, are directory provisions.<sup>455</sup>

§ 5017. **Form and sufficiency.** Where there are two orders, but the substance of one is contained in the other, so that two orders were not necessary, only one appeal and one bond are

Calkins, 12 Mont. 456. Appeals taken from two distinct orders are each ineffectual and will be dismissed, when only one undertaking on appeal is filed, which fails to designate to which of the appeals it was intended to apply, and, in such case, the appellant is not authorized to file new undertakings. *Home, etc., Associates v. Wilkins*, 71 Cal. 626.

<sup>447</sup> Cal. Code Civ. Pro., § 947; *Englund v. Lewis*, 25 Cal. 355.

<sup>448</sup> *Foster v. Foster*, 7 Paige Ch. 48.

<sup>449</sup> *Dore v. Covey*, 13 Cal. 502.

<sup>450</sup> *Chemung Canal Bank v. Judson*, 10 How. Pr. 133.

<sup>451</sup> *Billings v. Roadhouse*, 5 Cal. 71.

<sup>452</sup> *Conklin v. Dutcher*, 5 How. Pr. 386. Where an instrument with sufficient sureties and properly conditioned has been given as an appeal bond, but instead of being in the form of a bond is in the form of an undertaking, it will, under the statute requiring courts to look at substance rather than form, be upheld as sufficient. *Wilson v. Morrell*, 5 Wash. St. 654.

<sup>453</sup> *Canfield v. Bates*, 13 Cal. 606.

<sup>454</sup> *Dore v. Covey*, 13 Cal. 502; and see *Brown v. Jessup*, 19 Oreg. 288. That they are usually stated, see *Beach v. Southworth*, 6 Barb. 173; *Blood v. Wilder*, 6 How. Pr. 446.

<sup>455</sup> *Dobbins v. Dollarhide*, 15 Cal. 375; *Dore v. Covey*, 13 id. 502.

necessary.<sup>456</sup> If an appeal be taken from two separate orders, two separate securities must be given.<sup>457</sup> But where a judgment is single, only one undertaking will be requisite, though it directs the payment of different sums to different defendants.<sup>458</sup> If the respondents have a distinct interest in the decree, a bond should be given to each; but if their interests be joint, one bond is sufficient.<sup>459</sup> If an instrument executed and deposited with the clerk, as required by section 351 of the California Code of Civil Procedure,<sup>460</sup> be lost or destroyed pending the appeal, the appellant, if unsuccessful, will be bound to execute another.<sup>461</sup> After an appeal which is a nullity, the party may, if the time has not expired, disregard such appeal and prosecute another.<sup>462</sup> "That the appellant will pay all costs and damages which may be awarded against him on the appeal, and also all the rents and profits of the premises in controversy during the pendency of the appeal, not exceeding six hundred dollars," is a sufficient undertaking under this section.<sup>463</sup> A bond running "to the respondent, if living, and if not living, then to his executors," is not a bond to the adverse party, and will not sustain an appeal.<sup>464</sup> An undertaking on an appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite.<sup>465</sup> Where a bond was executed by a surety, and rejected by the justice, and afterwards, without the knowledge of the obligor, the name of another was interlined as an obligor, who executed the bond, it was held that it was void as to the first obligor.<sup>466</sup>

§ 5017a. *The same — continued.* Where there are several appeals in the same transcript it is the general rule that there should be an undertaking on appeal for each order or judgment appealed from, and each appeal should be cited in the under-

<sup>456</sup> Gregory v. Dodge, 3 Paige Ch. 90.

<sup>457</sup> Schermerhorn v. Anderson, 1 N. Y. 430.

<sup>458</sup> Smith v. Lynes, 2 N. Y. 569; S. C., 4 How. Pr. 209.

<sup>459</sup> Thompson v. Ellsworth, 1 Barb. Ch. 624.

<sup>460</sup> N. Y. Code, § 337.

<sup>461</sup> Worrall v. Munn, 17 N. Y. 475.

<sup>462</sup> Kelsey v. Campbell, 38 Barb. 238; Kirby v. Collins, 5 Wash. St. 682.

<sup>463</sup> Zoller v. McDonald, 23 Cal. 136.

<sup>464</sup> Anderson v. Anderson, 20 Wend. 585.

<sup>465</sup> Curtis v. Richards, 9 Cal. 33; Tissot v. Darling, id. 278.

<sup>466</sup> O'Neale v. Long, 4 Cranch, 60; and see Martin v. Thomas, 24 How. (U. S.) 315.

taking.<sup>467</sup> If but one undertaking is filed on distinct appeals, without special reference to either matter appealed from, it is void, and the appellant is not authorized to file a new undertaking so as to preclude dismissal.<sup>468</sup> If a single undertaking is given, and refers to only one of the orders appealed from, or to the judgment alone, the appellate court will have jurisdiction of only the matter so referred to in the undertaking, and the other appeals will be dismissed.<sup>469</sup> One undertaking on appeal is, however, sufficient, where there is in the same notice and transcript an appeal from a judgment with an appeal from an order denying a new trial, and the undertaking is in terms applicable to both appeals.<sup>470</sup> But an undertaking in such case which recites that it is given "on such appeal" is void for uncertainty, and both appeals will be dismissed.<sup>471</sup> An undertaking on appeal is sufficient, although incorrectly reciting the date of the order appealed from, if there is but one order and one appeal, and the undertaking in all other respects correctly describes them.<sup>472</sup> On an appeal from a judgment awarding an injunction and for costs and damages, an undertaking in the form of and purporting to be an undertaking to stay execution, will not be considered as the undertaking on appeal required by the California statute.<sup>473</sup>

<sup>467</sup> *Webb v. Trescony*, 76 Cal. 621; also, to same effect, *Centerville, etc., Co. v. Bachtold*, 109 id. 111; *Sharon v. Sharon*, 68 id. 326; *McCormick v. Belvin*, 96 id. 182; *Corcoran v. Desmond*, 71 id. 100; *Pacific Paving Co. v. Bolton*, 89 id. 154.

<sup>468</sup> *Home, etc., Assoc. v. Wilkins*, 71 Cal. 626; *McCormick v. Belvin*, 96 id. 182.

<sup>469</sup> *Crew v. Diller*, 89 Cal. 154; *Schurtz v. Romer*, 81 id. 244; *Bernlaud v. Beecher*, 74 id. 617; *Centerville, etc., Co. v. Bachtold*, 109 id. 111; *Wood v. Pendola*, 77 id. 82; *Sebree v. Smith*, 2 Idaho, 327; see *Edgecomb v. His Creditors*, 19 Nev. 149.

<sup>470</sup> *Williams v. Dennison*, 86 Cal. 430; *Centerville, etc., Co. v. Bachtold*, 109 id. 111; *Chester v. Bakersfield, etc., Assoc.*, 64 id. 42; *Webb v. Treacy*, 76 id. 621; *Watkins v. Morris*, 14 Mont. 354; and see *Winter v. McMillan*, 87 Cal. 256.

<sup>471</sup> *Motherwell v. Taylor*, 2 Idaho, 139; *Eddy v. Van Ness*, id. 93; see *Farni v. Youell*, 95 Cal. 442.

<sup>472</sup> *Dyer v. Bradley*, 88 Cal. 590; *Swasey v. Adair*, 83 id. 136. So, where there is a mistaken indorsement of the title of the case in which the undertaking is given. *Herrlich v. McDonald*, 72 Cal. 579.

<sup>473</sup> *Duffy v. Greenebaum*, 72 Cal. 157. Under Washington practice, a *supersedeas* bond on appeal is sufficient without the giving of an appeal bond. *State v. Seavey*, 7 Wash. St. 562; *Ewing v. Van Wagenen*, 6 Wash. St. 39. Instance of insufficient undertaking on appeal. See *Frevert v. Swift*, 19 Nev. 400.

§ 5018. **Justification of sureties.** The adverse party may except to the sufficiency of the sureties at any time within thirty days after the filing of such undertaking; and unless they or other sureties, within twenty days after the appellant has been served with notice of such exception, justify before a judge of the court below, a county judge, or county clerk, upon five days' notice to the respondent of the time and place of justification, execution of the judgment, order, or decree appealed from is no longer stayed.<sup>474</sup> The time has been held to run from the filing of the undertaking, and not from the service of copy of undertaking and notice of appeal.<sup>475</sup> Where, after notice of exception, the time for justification was extended, the failure of the sureties to justify within five days after notice of exception renders the appeal a nullity; that the statute upon this is peremptory, and the court had no power to extend the time.<sup>476</sup> And it is error in the judge to make an order of *supersedeas* staying the execution.<sup>477</sup> And where judgment is for more than three thousand dollars, several persons may act as sureties, and justify severally in the amount specified in the undertaking as that for which either becomes responsible.<sup>478</sup>

§ 5019. **Justification, affidavit of.** Every undertaking must be accompanied by the affidavits of the sureties that each of them is a resident and householder or freeholder within the state, and are each worth the sum specified in the undertaking, over and above all their just debts and liabilities, exclusive of property exempt from execution.<sup>479</sup>

<sup>474</sup> Cal. Code Civ. Pro., § 948; see *Boyer v. Superior Court*, 110 Cal. 401; *Bank of Escondido v. Superior Court*, 106 id. 43. The failure of the sureties to justify when excepted to is no ground for dismissing the appeal, but only affects the stay of execution. *Swasey v. Adair*, 83 Cal. 136; *Wittram v. Crommelin*, 72 id. 89; see § 5015, *ante*.

<sup>475</sup> *Webster v. Stephens*, 3 Abb. Pr. 227; see *Chemin v. East Portland*, 19 Oreg. 512.

<sup>476</sup> *Roush v. Van Hagen*, 17 Cal. 121; *Lower v. Knox*, 10 id. 480; *Chamberlain v. Dempsey*, 13 Abb. Pr. 421; S. C., 22 How. Pr. 356; *Kelsey v. Campbell*, 14 Abb. Pr. 368; S. C., 38 Barb. 238.

<sup>477</sup> *Mokelumne Hill Co. v. Woodbury*, 10 Cal. 188.

<sup>478</sup> Cal. Code Civ. Pro., § 1057; see, also, *Id.*, § 942.

<sup>479</sup> *Id.*, § 1087. When no exception is taken in the trial court to the affidavit of sureties upon an appeal bond, the defect is thereby waived, and can not be raised in the appellate court. *McEachern v. Brackett*, 8 Wash. St. 652.



§ 5020. **Liability of sureties.** An appeal bond will be so construed as to carry out the obvious intention of the parties.<sup>480</sup> In an action upon a bond or written undertaking there can be no constructive parties jointly liable with proper obligors.<sup>481</sup> An appeal bond signed by a firm as sureties on appeal renders only the partner who signed the firm's name liable, unless the other partner assented.<sup>482</sup> A right of action on an undertaking executed to stay a writ of restitution pending an appeal from a judgment in ejectment accrues upon the affirmance of the judgment, though the liability of the obligors may continue until the applicants deliver possession of the premises recovered.<sup>483</sup> The liability of the sureties can not be greater than that of the principal.<sup>484</sup> In New York it has been held that the undertaking only extends to the case of an affirmance of the judgment, and the sureties are not liable on the dismissal of an appeal.<sup>485</sup> But otherwise if the dismissal be from mere neglect to prosecute the appeal.<sup>486</sup> But now sureties are liable in all cases of dismissal.<sup>487</sup> Affirmance means an affirmance by any tribunal having cognizance of the cause.<sup>488</sup> The sureties upon a joint undertaking are liable, if the judgment is affirmed against one.<sup>489</sup>

§ 5020a. **The same — continued.** In attacking the sufficiency of an appeal bond, merely a *prima facie* showing on the part of the respondent will cast the burden of showing the responsibility of sureties upon the appellant.<sup>490</sup> The justification of the sureties, by their oath attached to the appeal bond, establishes a *prima facie* justification, which is sufficient, unless overcome at the instance of the party excepting and by the examination of the sureties by him.<sup>491</sup> Where a bond on appeal

<sup>480</sup> *Swain v. Graves*, 8 Cal. 549; and see, as to construction of appeal bond, *McCallion v. Savings, etc., Soc.*, 83 Cal. 571.

<sup>481</sup> *Lindsey v. Flint*, 4 Cal. 88.

<sup>482</sup> *Charman v. McLean*, 1 Oreg. 339.

<sup>483</sup> *De Castro v. Clarke*, 29 Cal. 11.

<sup>484</sup> *Whitney v. Allen*, 21 Cal. 233; *Sharon v. Sharon*, 84 Id. 433.

<sup>485</sup> *Watson v. Husson*, 1 Duer, 242; *Drummond v. Husson*, 14 N. Y. 60; *Mills v. Forbes* (No. 12), 12 How. Pr. 446.

<sup>486</sup> *Karth v. Light*, 15 Cal. 327; *Chamberlain v. Reed*, 16 Id. 207; *Chase v. Beraud*, 29 Id. 138.

<sup>487</sup> See Cal. Code Civ. Pro., § 942.

<sup>488</sup> *Gardner v. Barney*, 24 How. Pr. 467.

<sup>489</sup> Id.

<sup>490</sup> *Kirby v. Collins*, 5 Wash. St. 682.

<sup>491</sup> *Bank of Escondido v. Superior Court*, 106 Cal. 43.



has no validity as a statutory bond, a motion for a judgment thereon against the sureties should be denied, even if shown to be supported by a consideration, and to be good as a common-law bond.<sup>492</sup> The obligation of the sureties upon an undertaking to stay execution pending an appeal to pay the judgment in case of the default of the defendant is absolute, and continues until the judgment is actually paid.<sup>493</sup>

§ 5021. **Money judgment.** The undertaking, to operate as a stay of execution, must be in double the amount of the judgment. The conditions of the undertaking are, that if the judgment or order appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellant upon the appeal, and that if the appellant does not make such payment in thirty days after filing the *remittitur* of the Supreme Court, judgment may be rendered against the sureties upon motion of the respondents.<sup>494</sup> When the judgment or order appealed from is made payable in a specified kind of money or currency, the undertaking required by this section shall be drawn and made payable in the same kind of money or currency specified in such judgment.<sup>495</sup>

§ 5022. **Remedy on defective undertaking.** An appeal will not be dismissed on the ground of insufficiency in the justifica-

<sup>492</sup> *Powers v. Chabot*, 93 Cal. 266; *Central Lumber, etc., Co. v. Center*, 107 id. 193.

<sup>493</sup> *Hitchcock v. Caruthers*, 100 Cal. 100; and see *Pleper v. Peers*, 98 id. 42. See, generally, as to liability of sureties on appeal bonds, *Cline v. Mitchell*, 1 Wash. St. 24; *Bellingham Bay Nat. Bank v. Central Hotel Co.*, 4 id. 643; *Orr v. Hopkins*, 3 N. Mex. 142; *Oshorn v. Rogers*, 9 N. Y. Supp. 736. Complaint in action on appeal bond. See *Moffat v. Greenwalt*, 90 Cal. 368; *Pleper v. Peers*, 98 id. 42; *Heshlon v. Scott*, 94 Ind. 570; *Scott v. Merchant*, 88 id. 349; *Pierce v. Banta*, 9 Ind. App. 376; § 1471. *ante*. Entry of judgment against sureties on undertakings on appeal. *Mowry v. Henry*, 86 Cal. 471; *Meredith v. Mining Assoc.*, 60 id. 677; *Hansen v. Martin*, 63 id. 282; *Hitchcock v. Caruthers*, 100 id. 100.

<sup>494</sup> Cal. Code Civ. Pro., § 942; see *Hitchcock v. Caruthers*, 100 Cal. 100; *McCallion v. Hibernia, etc., Soc.*, 98 id. 442; *Pleper v. Peers*, 98 id. 42; § 4845. *ante*.

<sup>495</sup> Cal. Code Civ. Pro., § 942.

tion of the sureties, where the undertaking was both to render the appeal effectual and to stay execution, and the justification was sufficient for the former purpose. Respondent's remedy is by motion in the court below for leave to proceed on the judgment.<sup>496</sup>

§ 5023. **Setting aside undertaking.** If an undertaking is defective on an appeal from judgment of sale in foreclosure, the plaintiff should move to set it aside; otherwise, if he proceed to sell the premises under the judgment, the sale must be vacated.<sup>497</sup> Where the undertaking substantially conforms with the requirements of the statute, defects will be disregarded, if not objected to by motion to set it aside.<sup>498</sup>

§ 5024. **Undertaking to effect stay.** Whenever an undertaking has been duly given and perfected, it suspends all further proceedings upon the judgment appealed from, or upon the matter embraced therein, but as regards other matter, the power to proceed is not affected.<sup>499</sup> Unless an undertaking be given, the mere execution and deposit of the instrument with the clerk will be ineffectual, and will procure no stay.<sup>500</sup> When given, such an undertaking only stays future, and does not affect the validity of any past, proceedings. Thus, where given after levy, it does not operate to discharge a lien already affected, but only suspends its enforcement.<sup>501</sup> Such stay is inchoate upon giving the undertaking, but defeasible in case sureties fail to justify if excepted to.<sup>502</sup> When judgment directs a sale to satisfy a lien other than a mortgage lien, the undertaking need not provide for payment of any deficiency which the judgment may direct to be paid.<sup>503</sup> In other cases, if there is a provision for the payment of a deficiency, the undertaking must

<sup>496</sup> *Dobbins v. Dollarhide*, 15 Cal. 374; *Mokelumne Hill Co. v. Woodbury*, 10 id. 185.

<sup>497</sup> *Parfitt v. Warner*, 13 Abb. Pr. 471; see *Johnson v. King*, 91 Cal. 307.

<sup>498</sup> *Parfitt v. Warner*, 13 Abb. Pr. 471.

<sup>499</sup> *Curtis v. Stillwell*, 32 Barb. 354; *Welch v. Cook*, 7 How. Pr. 282; see *Trustees of Penn Yan v. Forbes*, 8 id. 285.

<sup>500</sup> *Waring v. Ayres*, 12 Abb. Pr. 112.

<sup>501</sup> *In re Berry*, 26 Barb. 55; *Cook v. Dickerson*, 1 Duer, 679; *Rathbone v. Morris*, 9 Abb. Pr. 213; *Waring v. Ayres*, 12 id. 112; *Stricker v. Wakeman*, 13 id. 85; but see Cal. Code Civ. Pro., §§ 671, 946.

<sup>502</sup> *Thompson v. Blanchard*, 2 N. Y. 561; 4 How. Pr. 210.

<sup>503</sup> *Englund v. Lewis*, 25 Cal. 337.

provide for such deficiency.<sup>504</sup> And if the undertaking is given only for costs and double the amount of the personal judgment, an execution for the sale of the property under the lien is not stayed;<sup>505</sup> nor will, in such case, a bond for costs stay the proceedings.<sup>506</sup>

§ 5025. **Who exempt from undertaking.** No bond, written undertaking, or security can be required of the state or the people thereof, or any officer thereof, or of any county, city or town.<sup>507</sup>

§ 5025a. **Appeal bond — miscellaneous.** An appeal is not taken, or perfected, until the appeal bond is filed.<sup>508</sup> Where no bond is given by the appellant upon appeal, the appellate court is without jurisdiction, and the appeal will be dismissed.<sup>509</sup> To warrant the execution of an appeal bond by an attorney in fact, authority therefor, of equal extent with the bond, is necessary, and should accompany the bond, and when the authority of the agent is challenged by motion to dismiss the appeal, it should be produced.<sup>510</sup> Where a statute requires that the sureties upon an appeal bond shall be approved by the court, it is competent for the obligee to waive such approval, and if the waiver clearly appear the instrument is binding upon the sureties, though not formally approved.<sup>511</sup> The fact that an appeal has been dismissed upon the appellant's motion will not bar a second appeal, if taken in time, when the only defect in the

<sup>504</sup> *Englund v. Lewis*, 25 Cal. 337.

<sup>505</sup> *Id.*; see *Stafford v. Union Bank of Louisiana*, 16 How. (U. S.) 135.

<sup>506</sup> *Orchard v. Hughes*, 1 Wall. 73.

<sup>507</sup> Cal. Code Civ. Pro., § 1058; see, also, *Kelley v. Kitsap Co.*, 5 Wash. St. 521; *Elma v. Carney*, 4 id. 418; *Holmes v. City of Mattoon*, 111 Ill. 27; 53 Am. Rep. 602; *Scheerer v. Edgar*, 67 Cal. 377; *Von Schmidt v. Widber*, 90 id. 511. In Colorado, where an appeal is taken by the board of county commissioners in an action against them, the appeal bond must be executed in the name of the board, and not by the members individually. *Commissioners, etc. v. King*, 9 Col. 542.

<sup>508</sup> *Webber v. Brieger*, 1 Col. App. 92; *Hunt v. Arkell*, 13 Col. 543; see § 4904, *ante*.

<sup>509</sup> *Smithson v. Woodin*, 13 Wash. St. 709; *Bokien v. State*, 14 id. 401.

<sup>510</sup> *Schofield v. Felt*, 10 Col. 146.

<sup>511</sup> *Irwin v. Crook*, 17 Col. 16; and see *Ester v. Acklemeyer*, 81 Ind. 163.

first appeal was the failure to file a bond within the prescribed time.<sup>512</sup> Parties joining in an appeal subsequent to the original notice, as permitted under the laws of Washington, must file an appeal bond in addition to that filed by the parties first appealing.<sup>513</sup> Although the filing of a notice and undertaking on appeal stays the proceedings of the trial court upon the judgment or order appealed from, it does not divest the court of power to settle and certify such statements as are required to present matters of law or fact to the appellate court.<sup>514</sup>

<sup>512</sup> *Tacoma Lumber, etc., Co. v. Wolff*, 5 Wash. St. 264; see § 4993, *ante*.

<sup>513</sup> *Stans v. Baltey*, 9 Wash. St. 115.

<sup>514</sup> *Mercantile Co. v. Fussey*, 13 Mont. 401; *The Latona v. McAllep*, 3 Wash. Ter. 332; *Flynn v. Cottle*, 47 Cal. 526.

## CHAPTER III.

### STATEMENT ON APPEAL.

**§ 5026. In general.** To what extent the California Code of Civil Procedure has changed the practice relating to appeals has not yet been fully adjudicated. It is believed, however, that there has been no substantial change. Under section 388 of the California Practice Act, the party wishing to appeal prepared a "statement," stating therein, specifically, the errors or grounds upon which he intended to rely upon the appeal, and inserting so much of the evidence as might be necessary to explain the particular errors or grounds specified. By another section it was provided that an exception when not delivered in writing, or written down by the clerk, might be entered in the judge's minutes and afterwards settled in a statement of the case.<sup>1</sup> If exceptions were reduced to writing, settled and allowed by the judge during the trial and before judgment, they became part of the judgment-roll without further action by the court or party; otherwise the party was allowed twenty days to prepare his statement. The Code of Civil Procedure does not in terms provide for a statement on appeal, except where a statement has been made under a motion for new trial, in which case such statement "may be used on appeal from a final judgment equally as upon appeal from the order granting or refusing a new trial."<sup>2</sup> But though the Code of Civil Procedure does not provide for a "statement" on appeal, such as was authorized by section 338 of the Practice Act, the same thing in substance is accomplished by a "bill of exceptions," prepared and settled in a similar manner.<sup>3</sup> A bill of exceptions to any decision may be presented to the court or judge for settlement at the time when the decision is made, and when settled and signed by the

<sup>1</sup> Cal. Code Civ. Pro., § 189.

<sup>2</sup> Id., § 950.

<sup>3</sup> See Id., § 650. There is no difference between a statement and bill of exceptions in form or substance, except that the former follows a notice of motion for a new trial. *People v. Crane*, 60 Cal. 279; *Schultz v. Keeler*, 2 Idaho, 305; see § 4893, *ante*.

judge, is filed by the clerk.<sup>4</sup> Such bill of exceptions becomes part of the judgment-roll, which is made up by the clerk immediately after entering judgment.<sup>5</sup> Where the bill of exceptions is settled after judgment, it is filed with the clerk; but there is no provision making it a part of the record or judgment-roll. Such bill of exceptions, however, must be furnished to the Supreme Court by the appellant, if he relies upon it, together with his notice of appeal and a copy of the judgment-roll.<sup>6</sup> While this does not make it a part of the judgment-roll, and, therefore, not a part of the record in the court below, it becomes a part of the record on appeal from the judgment.<sup>7</sup> As a statement on appeal and a bill of exceptions settled perform the same office in an appeal from a judgment, differing only in name and partially in form, and the former being perhaps still admissible, the decisions under the former practice act are still valuable, and in most respects applicable.<sup>8</sup>

The office of the statement is to bring into the record orders and rulings, with facts necessary to explain them, which are made in all stages of the proceedings, as well as during the progress of the trial, and not contained in the judgment-roll.<sup>9</sup> And questions not arising on the judgment-roll are thus presented.<sup>10</sup> But if an appeal is taken from the judgment-roll alone, no statement of grounds nor errors need be assigned, nor be contained in the transcript.<sup>11</sup> The case regularly settled and filed, and made part of the papers presented to the court, is indispensable.<sup>12</sup> Nonappealable orders can be reviewed only by means of a statement on appeal from the final judgment.<sup>13</sup> Where, on appeal from an order subsequent to final judgment,

<sup>4</sup> Cal. Code Civ. Pro., § 649.

<sup>5</sup> Id., § 670, as amended by act of 1895.

<sup>6</sup> Id., § 950.

<sup>7</sup> Caldwell v. Parks, 47 Cal. 640; Berry v. S. F. & N. P. R. Co., 47 id. 643.

<sup>8</sup> See Wetherbee v. Carroll, 33 Cal. 549; Cal. Code Civ. Pro., § 650.

<sup>9</sup> Abbott v. Douglass, 28 Cal. 299; De Johnson v. Sepulbeda, 5 id. 149; Harper v. Minor, 27 id. 107.

<sup>10</sup> Wetherbee v. Carroll, 33 Cal. 549.

<sup>11</sup> Solomon v. Reese, 34 Cal. 28; Jones v. City of Petaluma, 30 id. 230; 89 Am. Dec. 88. On an appeal from a judgment, the judgment-roll alone is brought before the appellate court. Clark v. Baker, 6 Mont. 153.

<sup>12</sup> Conolly v. Conolly, 16 How. Pr. 224; Broward v. State, 9 Fla. 422.

<sup>13</sup> Gates v. Walker, 35 Cal. 289; see § 5087, *post*.

objections to the consideration of certain affidavits contained in the record were not taken as required by rule 13 of the Supreme Court, such objections will be deemed waived; but the rule is otherwise in respect to the subject-matter of a statement on appeal contained in such record, where no statement embodying the same, duly settled, certified, or agreed to, as required by law, existed in the court below.<sup>14</sup> The allegation of the omission of the judge to settle a statement which was submitted to him can not be taken as a substitute for a statement.<sup>15</sup> To review the final decision of a referee, a case must be made containing the facts found by the referee, his conclusions of law thereon, and the exceptions of the party who appeals.<sup>16</sup> A case should present with legal and logical precision the questions which are to be examined, and should contain nothing else.<sup>17</sup> The questions of law and fact raised must be distinctly set forth, accompanied with only so much evidence as may be necessary to show their pertinency and materiality; and when such statement or bill of exceptions is settled, it will be presumed that it contains all the evidence given in the cause which was necessary to be stated in order to explain the points specified, and that it would not have presented a different case, in respect to the specified points, had it contained also the omitted evidence.<sup>18</sup>

Where a judgment on trial by the court comes up for review without any finding of facts, nothing can be presumed against the correctness of the judge's decision.<sup>19</sup> The appellate court can not look beyond the findings of fact contained in the case, in order to draw any inference of fact bearing on

<sup>14</sup> *Wetherbee v. Carroll*, 33 Cal. 549; *Rogers v. Parish*, 35 id. 127.

<sup>15</sup> *Hoadley v. Crow*, 22 Cal. 265.

<sup>16</sup> *Johnson v. Whitlock*, 13 N. Y. 344; *Westcott v. Thompson*, 16 N. Y. 613; see *Bash v. Mining Co.*, 7 Wash. St. 122.

<sup>17</sup> *Bissel v. Hamlin*, 20 N. Y. 519.

<sup>18</sup> *Abbey Homestead Association v. Willard*, 48 Cal. 619; see, also, *People v. Armstrong*, 44 id. 327; *Bush v. Taylor*, 45 id. 112; *Ferrer v. Home M. I. Co.*, 47 id. 427. Necessity and sufficiency of statement on appeal. See *Puget Sound Iron Co. v. Worthington*, 2 Wash. Ter. 472; *Caton v. Switzler*, 3 id. 242; *Cogswell v. Railway Co.*, 5 Wash. St. 46; *Barber v. Briscoe*, 8 Mont. 214; *Healy v. Seward*, 5 Wash. St. 319; *Asher v. Lekopsky*, 10 id. 379; *Timm v. Stegman*, 6 id. 13. A statement of facts is not required on appeal in an equity cause where the whole case has been determined upon the pleadings. *Ewing v. Van Wagenen*, 6 Wash. St. 39.

<sup>19</sup> *Viele v. Troy & Boston R. R. Co.*, 20 N. Y. 184; *Carman v. Pultz*, 21 id. 547; see § 4654, *ante*.

the appeal.<sup>20</sup> It is essential that the finding upon the facts be explicit, and cover all the material facts in the case.<sup>21</sup> In order to review the judgment after trial by the court, or the decision of a referee, a statement of the facts found by the judge, and his conclusions of law, is imperatively required. The party who prepares the case should insert the statement, which will be subject to amendment and settlement by the judge. If a conclusion of fact is to be reviewed, then the evidence bearing upon that conclusion must be inserted. It will also contain the exceptions taken during the trial, and those taken after trial and judgment.<sup>22</sup> On appeal from an order granting or refusing a new trial, the appellate court is confined to the record on which the court below ruled.<sup>23</sup> Where the appellants, in their statement on motion for a new trial, fail to specify the particulars in which the evidence is alleged to be insufficient to justify the findings, the findings of fact will not be reviewed on an appeal from an order denying a new trial.<sup>24</sup> The following copy of the order of the court in denying the application for a new trial: "Now, on this day, in open court, comes on to be heard defendants' motion for a new trial, and thereupon, after having heard the arguments of counsel, the court overrules the same, to which ruling of the court defendants, by counsel, except," was held not to show an appearance of the counsel of the plaintiff at the argument of the motion, and, therefore, did not show a waiver of the objection to the filing of the statement.<sup>25</sup> In a vast majority of cases there would be no occasion for a motion for a new trial if the findings were what they ought to be; for in nine cases out of ten, where the trial is by the court, the sole controversy here is as to whether the conclusions of law are correct. In all such cases there should be, and there certainly need be, no occasion for a motion for a new trial, or

<sup>20</sup> *Stewart v. Smith*, 14 Abb. Pr. 75.

<sup>21</sup> *Rogers v. Beard*, 20 How. Pr. 282.

<sup>22</sup> *Hunt v. Bloomer*, 13 N. Y. 341; *Magie v. Baker*, 14 id. 435; *Johnson v. Whitlock*, 13 id. 344; *Brewer v. Isish*, 12 How. Pr. 481; § 5029, *post*.

<sup>23</sup> *Quivey v. Gambert*, 32 Cal. 304; § 4967, *ante*.

<sup>24</sup> Cal. Code Civ. Pro., § 659, subd. 3; see *Kelly v. Mack*, 49 Cal. 524; *Coleman v. Gilmore*, id. 340; *Martin v. Matfield*, id. 42; *The Abbey H. A. v. Willard*, 48 id. 614; *Thorne v. Hammond*, 46 id. 530; *Doherty v. Enterprise Mining Co.*, 50 id. 187; *Spanagel v. Dellinger*, 38 id. 280; and see § 4896, *ante*.

<sup>25</sup> *Munch v. Williamson*, 24 Cal. 169.



for bringing the evidence to this court in any form. Every such case ought to come here upon the judgment-roll.<sup>26</sup> A stipulation that a statement "be used on the motion for a new trial, and also on the appeal to the Supreme Court," includes an appeal both from the judgment and the order on motion for new trial.<sup>27</sup>

§ 5027. **Preparing statement.** It is sufficient, when the style of the court and title of the cause is given in the first paper, to afterwards give the name of the document, and at the head say "title of cause;" and where a paper is verified or acknowledged, to say "duly verified" or "duly acknowledged;" the date of the paper, date of filing, date of service, etc.—the rest may with advantage be omitted.<sup>28</sup> Where an appeal is taken from an order made upon other evidence, either alone or in connection with affidavits, documents not filed, judgment-rolls, and files in other cases, which are not and can not be made a part of the files in the case heard, and questions of admissibility of evidence, etc., which may arise, so much of these as is necessary to present the legal points contested is made part of the record by statement, and no other method is provided.<sup>29</sup> A case which refers to a paper in the judgment-roll for a statement of facts and conclusions of law, and to another schedule or paper for the exceptions, is inartificial.<sup>30</sup> Preparing cases in actions at law, and in equity, in the practice under the New York statute, explained.<sup>31</sup>

§ 5028. **When statement unnecessary.** In Nevada, in appeals from orders granting or refusing a new trial, a statement on appeal is not necessary.<sup>32</sup> So from an order made on affidavits

<sup>26</sup> *Tewksbury v. Magraff*, 33 Cal. 237.

<sup>27</sup> *Hastings v. Halleck*, 13 Cal. 203; *Godchaux v. Mulford*, 26 id. 316; 85 Am. Dec. 178; *Burnett v. Pacheco*, 27 Cal. 409.

<sup>28</sup> *Marriner v. Smith*, 27 Cal. 654.

<sup>29</sup> *Haggin v. Clark*, 28 Cal. 162; see, also, *Abbott v. Douglass*, id. 299; *Hutton v. Reed*, 25 id. 479; *Harper v. Minor*, 27 id. 107.

<sup>30</sup> *Smith v. Grant*, 15 N. Y. 590; *Magle v. Baker*, 14 id. 435. Exhibits, how made part of statement. See *Sharon v. Sharon*, 79 Cal. 633.

<sup>31</sup> *Lawrence v. Fowler*, 20 How. Pr. 407.

<sup>32</sup> *Gregory v. Frothingham*, 1 Nev. 253; see § 4895, *ante*. Review without statement or bill of exceptions under Montana practice. See *Bookwalter v. Conrad*, 14 Mont. 62; *Mining Co. v. Weinstein*, 7 id. 346; *Fredericks v. Davis*, 6 id. 457; under Washington practice. *Seattle, etc., Railway Co. v. Johnson*, 7 Wash. St. 97.

filed.<sup>33</sup> Nor is it necessary to specify the grounds upon which the appellant will rely for a reversal of the order of discharge in certain cases.<sup>34</sup> Where no statement on appeal is required, no specification of errors is required.<sup>35</sup> The statement prepared and used on the hearing of the motion for new trial in the court below will be sufficient.<sup>36</sup> The affidavits must be annexed to the order in place of a statement, and the certificate of the clerk should specify the affidavits used, which should have been marked at the time as filed on the motion.<sup>37</sup> But in other cases, if there is no statement on appeal, and no specification of errors, the appeal will be disregarded.<sup>38</sup> Where there is no assignment of errors, or statement of the points and authorities on which the appellant relies, the appeal will be dismissed.<sup>39</sup>

§ 5029. **What statement shall contain.** The statement shall state specifically the particular errors or grounds upon which he intends to rely on the appeal.<sup>40</sup> Error will not be presumed, but must be affirmatively shown, and all intendments are in favor of the regularity of the court below.<sup>41</sup> By an assignment of errors is meant a specification of the errors upon which appellant will rely, with such fullness as will give aid to the court in the examination of the transcript.<sup>42</sup>

Errors at the trial can not be reviewed except upon a sufficient case or exceptions.<sup>43</sup> A statement that certain action of the court below was wrong is insufficient.<sup>44</sup> The appellant must

<sup>33</sup> *Paine v. Linhill*, 10 Cal. 370; *Stone v. Stone*, 17 id. 514; *Walden v. Murdock*, 23 id. 540; 83 Am. Dec. 135; *Haggin v. Clark*, 28 Cal. 162; *Gray v. Harrison*, 1 Nev. 502.

<sup>34</sup> *Haggin v. Clark*, 28 Cal. 162.

<sup>35</sup> *Burnett v. Pacheco*, 27 Cal. 408; *Hutton v. Reed*, 25 id. 478.

<sup>36</sup> *Wadden v. Murdock*, 23 Cal. 540; Cal. Code Civ. Pro., § 950; § 4895, *ante*.

<sup>37</sup> *Paine v. Linhill*, 10 Cal. 370; *Stone v. Stone*, 17 id. 513.

<sup>38</sup> *Burnett v. Pacheco*, 27 Cal. 408.

<sup>39</sup> *People v. Comedo*, 11 Cal. 70; id. 129.

<sup>40</sup> Cal. Code Civ. Pro., §§ 659, 661; see § 4895, *ante*.

<sup>41</sup> *Ford v. Holton*, 5 Cal. 320; *Todd v. Winants*, 36 id. 129; *Nosler v. Haynes*, 2 Nev. 53; *Champion v. Sessions*, id. 272.

<sup>42</sup> *Squires v. Foorman*, 10 Cal. 298; see § 4896, *ante*.

<sup>43</sup> *Burnett v. Pacheco*, 27 Cal. 408; *Otis v. Spencer*, 16 N. Y. 610; S. C., 6 Abb. Pr. 127; S. O., 15 How. Pr. 425; *Turner v. Haight*, 16 N. Y. 465.

<sup>44</sup> *Crisman v. Smith*, 22 Ind. 13.

show wherein the error consists.<sup>45</sup> And failing to specify the grounds, it forms no part of the record.<sup>46</sup> Errors of law on motion for a new trial must be specified.<sup>47</sup> So, also, from order made after judgment;<sup>48</sup> from an order granting nonsuit.<sup>49</sup> A general objection to the form of a verdict, without any specification of the particulars, will not be considered.<sup>50</sup> A specification of the particular grounds of error is the essential element; the evidence is the mere incident.<sup>51</sup> On the ground of error in improperly admitting evidence irrelevant to the issue, the irrelevancy must clearly appear; some facts should be adduced showing its admission had an undue influence upon the verdict of the jury.<sup>52</sup> So as to the exclusion of evidence, its relevancy and the purpose for which it is offered must be stated.<sup>53</sup> The naked direction of a court, unaccompanied by any facts, can not support allegations of error.<sup>54</sup> Errors assigned upon instructions will not be considered, unless there is an authenticated statement of the evidence to show the pertinency or relevancy of such instructions.<sup>55</sup> An assignment of error that the verdict of the jury was against the law is improper.<sup>56</sup> An assignment of error to an answer to a point propounded on the trial below must repeat the point.<sup>57</sup> An objection to evidence offered and received should be specific.<sup>58</sup>

<sup>45</sup> *People v. Wells*, 3 Cal. 148; *Ford v. Holton*, 5 id. 320; approved in *Owen v. Morton*, 24 id. 378; *Brown v. Tolles*, 7 id. 398; *People v. Richmond*, 29 id. 414; § 4896, *ante*.

<sup>46</sup> *Reynolds v. Lawrence*, 15 Cal. 359.

<sup>47</sup> *Barstow v. Newman*, 34 Cal. 90; *Loucks v. Edmondson*, 18 id. 203.

<sup>48</sup> *Leffingwell v. Griffing*, 29 Cal. 192.

<sup>49</sup> *Morgan v. Thrift*, 2 Cal. 562; *Holverstot v. Bugby*, 13 id. 43.

<sup>50</sup> *Douglass v. Kraft*, 9 Cal. 562; *Mahoney v. Van Winkle*, 21 id. 552.

<sup>51</sup> Id.; *Wixon v. Bear River & Auburn Water & Mining Co.*, 24 Cal. 367; 85 Am. Dec. 69; *Walls v. Preston*, 25 Cal. 59; *Millard v. Hathaway*, 27 id. 119; *Crowther v. Rowlandson*, 27 id. 376; *Moore v. Murdock*, 26 id. 524; *Burnett v. Pacheco*, 27 id. 410.

<sup>52</sup> See Cal. Code Civ. Pro., § 661; *McGarrity v. Byington*, 12 Cal. 426; *Green v. Killey*, 38 id. 201.

<sup>53</sup> *Roberts v. Unger*, 30 Cal. 676.

<sup>54</sup> *White v. Abernathy*, 3 Cal. 426.

<sup>55</sup> *Nelson v. Mitchell*, 10 Cal. 92.

<sup>56</sup> *Schofield v. Ferrers*, 46 Penn. St. 438.

<sup>57</sup> *Ditmars v. Commonwealth*, 47 Penn. St. 335.

<sup>58</sup> *Cullum v. Wagstaff*, 48 Penn. St. 300; § 4896, *ante*.

The Supreme Court can not receive evidence otherwise than through the statement or the record.<sup>59</sup> The statement shall contain so much of the evidence as may be necessary to explain the particular errors or grounds specified, and no more;<sup>60</sup> and so much of the evidence, rulings of the court, etc., as may be necessary to explain the points relied on.<sup>61</sup> It is not necessary that the evidence should be in the precise words of each witness.<sup>62</sup> A brief synopsis of its substance is proper.<sup>63</sup> The bodily insertion of the reporter's notes is condemned.<sup>64</sup> A mere rescript of the testimony by question and answer, with the objections taken and the rulings therein, will not be regarded as a compliance with section 648 of the Code of Civil Procedure.<sup>65</sup> It will be presumed that the statement contains all the evidence pertinent to the motion.<sup>66</sup> A reference to the evidence as taken by the clerk is sufficient, the evidence being in the transcript. The statement need not contain the evidence.<sup>67</sup> Where the statement on appeal does not purport to contain all the evidence, the appellate court will not consider an objection that the verdict is not sustained by the evidence.<sup>68</sup>

**§ 5030. Minutes of the court.** The minutes of the court, to form part of the record, must be embodied in the statement or bill of exceptions.<sup>69</sup> Instead of copying deeds and transcripts of record, where no point is made on the construction of the language, a brief statement of the instrument answers every purpose.<sup>70</sup>

<sup>59</sup> *Visher v. Webster*, 13 Cal. 58.

<sup>60</sup> Cal. Code Civ. Pro., § 648; *Hutton v. Reed*, 25 Cal. 478; *Haggin v. Clark*, 28 id. 162; § 4896, *ante*.

<sup>61</sup> *Hutton v. Reed*, 25 Cal. 478; *Stone v. Stone*, 17 id. 513.

<sup>62</sup> *Battersby v. Abbott*, 9 Cal. 565.

<sup>63</sup> *Ross v. Roadhouse*, 36 Cal. 586; 95 Am. Dec. 213.

<sup>64</sup> *People v. Getty*, 49 Cal. 584; see § 4896, *ante*.

<sup>65</sup> *Caldwell v. Parks*, 50 Cal. 502; compare *Cohen v. Wallace*, 107 id. 133.

<sup>66</sup> *Smith v. Athern*, 34 Cal. 506.

<sup>67</sup> *Dart v. Rush*, 14 Cal. 81.

<sup>68</sup> *Moore v. Tice*, 22 Cal. 514.

<sup>69</sup> *Dawley v. Hovious*, 23 Cal. 103; *Harper v. Minor*, 27 id. 107; *Moore v. Del Valle*, 28 id. 174; *Abbott v. Douglass*, id. 299; *Mendocino Co. v. Morris*, 32 id. 145; *People v. Empire G. & S. M. Co.*, 33 id. 171; see § 4894, *ante*.

<sup>70</sup> *Knowles v. Inches*, 12 Cal. 212; see § 4894, *ante*.

§ 5031. **Skeleton statement.** A statement containing the words "here insert," etc., describing writ, omitting without consent documents thus directed to be inserted in the statement as settled, will be stricken from the transcript on appeal.<sup>71</sup> When documentary evidence is referred to in a statement on motion for a new trial, the appellant can not, without the assent of the other party, insert copies of the same in the transcript on appeal, unless the statement has been engrossed as settled and authenticated, or unless the originals are on the files of the court or constitute a part of the records.<sup>72</sup> So much of instruments, when objected to as evidence, should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken.<sup>73</sup>

§ 5032. **Written instruments, etc.** Where a notice of motion to dismiss a complaint on specific grounds is given, to review the order made, the record must disclose the papers read or the evidence offered in their support.<sup>74</sup> No errors can be assigned on an instrument not embodied in the statement on appeal.<sup>75</sup> So where affidavits are used in support of a motion for new trial, the affidavits must be set forth, but the omission does not affect his right to raise the question as to errors apparent on the face of the record.<sup>76</sup> Where a written or printed instrument, as a newspaper "card," is rejected as evidence in the court below, such evidence or the substance of it must be returned with the record.<sup>77</sup> Interlocutory orders must be embodied in a statement or bill of exceptions.<sup>78</sup> From a decision on *habeas corpus*, the facts on which such decision was based must be presented.<sup>79</sup> A stipulation inserted in the transcript, and not embodied in the statement or bill of exceptions, forms no part of the record.<sup>80</sup>

§ 5033. **Filing and serving statement.** A statement on appeal must be filed within the time prescribed by law or the right is

<sup>71</sup> Kimball v. Semple, 31 Cal. 657; see "New Trial," *ante*, § 4895.

<sup>72</sup> Id.

<sup>73</sup> Provost v. Piper, 9 Cal. 552.

<sup>74</sup> Freeborn v. Glazier, 10 Cal. 337.

<sup>75</sup> Moore v. Semple, 11 Cal. 360.

<sup>76</sup> Branger v. Chevallier, 9 Cal. 353.

<sup>77</sup> Dwinelle v. Henriquez, 1 Cal. 387.

<sup>78</sup> Abbott v. Douglass, 28 Cal. 295.

<sup>79</sup> *Ex parte* Cleveland, 36 Ala. 306.

<sup>80</sup> Ritter v. Mason, 11 Cal. 214.

waived.<sup>81</sup> Moving for a new trial does not of itself operate to extend the time for filing a statement.<sup>82</sup> If notice of appeal be regularly served and filed, but no case or exceptions be filed within the statutory time, the appeal is left upon the judgment-roll.<sup>83</sup> If the appealed case is submitted on briefs, and they are not filed within the time specified, and the transcript contains no assignment of errors, the judgment will be affirmed.<sup>84</sup> In New York a case or exceptions can not form part of the papers on an appeal unless filed prior to entry of judgment, or unless an order be obtained authorizing the case or exceptions to be annexed to and form part of the judgment-roll.<sup>85</sup> The court refused to remand the cause for the purpose of amending the bill; but the court declined to decide that a new bill, with proper amendments, could not be filed.<sup>86</sup> The time for preparing and filing a statement may be enlarged upon good cause shown.<sup>87</sup> The time for filing statement may be extended thirty days beyond the twenty days allowed by statute;<sup>88</sup> and if more than thirty days' extension is granted, is good for the thirty days without consent of opposite party.<sup>89</sup> Until the time or its

<sup>81</sup> *Heihn v. Stansbury*, 12 Cal. 412; *Lafferty v. Brownlee*, 11 id. 132; *Harper v. Minor*, 27 id. 107; *Ryan v. Dougherty*, 30 id. 221; *Quivey v. Gambert*, 32 id. 312; *McIntyre v. Willis*, 20 id. 177; *Farnsworth v. Coquillard*, 22 Ind. 453; see § 4899, *ante*. The objection that the statement of facts was not filed within the time prescribed by the statute, being a jurisdictional question, may be raised for the first time in the appellate court. *Loos v. Rondema*, 10 Wash. St. 164.

<sup>82</sup> *Bryan v. Maume*, 28 Cal. 238; *Harper v. Minor*, *supra*; *Mahoney v. Caperton*, 15 id. 313. For the time within which statements and bills of exceptions must be prepared and settled, see Cal. Code Civ. Pro., §§ 650, 659, 661. A party desiring to appeal has a right to wait until the written judgment is filed in the case before preparing his statement of facts. *Bowen v. Hughes*, 5 Wash. 442.

<sup>83</sup> *Robinson v. Hudson River R. R. Co.*, 3 Abb. Pr. 115; *Conolly v. Conolly*, 16 How. Pr. 224. Under the Washington statute (Laws of 1896, p. 114, § 9), the service of a proposed statement of facts upon the only parties adverse to the appellant is sufficient, although there are other parties to the action who do not join the appellant in the appeal. *Howard v. Show*, 10 Wash. St. 151.

<sup>84</sup> *Holm v. Roach*, 25 Cal. 37.

<sup>85</sup> *Anderson v. Dickle*, 26 How. Pr. 199.

<sup>86</sup> *Mulford v. Cohn*, 18 Cal. 42.

<sup>87</sup> Cal. Code Civ. Pro., §§ 650, 651, 661; see § 4899, *ante*.

<sup>88</sup> Id., § 1054; *Bryan v. Maume*, 28 Cal. 238.

<sup>89</sup> Id.; see *Roos v. Rondema*, 10 Wash. St. 164; *Sadler v. Niess*, 5 id. 182.

extension given to file a case after its settlement has expired the case can not be noticed for argument.<sup>90</sup> After a statement is settled and filed, and becomes a record, it may be taken in the further progress of the action as *prima facie* evidence of the facts therein appearing.<sup>91</sup>

**§ 5034. Notice of settlement on bill of exceptions on appeal.**  
*Form No. 1162.*

[TITLE.]

To . . . . ., attorney for defendant:

Please take notice that the proposed bill of exceptions of the plaintiff herein, and the defendant's amendments thereto, will be presented to the judge of this court for settlement on the . . . . . day of . . . . ., 18.., at . . . . . o'clock A. M., at his chambers in the courthouse, at . . . . ., in said county.

[SIGNATURE.]

**§ 5035. Amendments.** After the draft of the bill of exceptions has been served on the opposite party, ten days are allowed within which to prepare and serve amendments thereto. The statement and amendments which may be served shall be presented to the judge who tried or heard the case, within ten days thereafter, upon notice of five days to the respondent, and a true statement shall thereupon be settled by the judge. If no amendments are served, then without any notice to the respondent.<sup>92</sup> Unless the respondent serves and files amendments within five days after service and filing of statement, he is deemed to have agreed to the statement;<sup>93</sup> or the judge, without notice to the respondent, may settle and authenticate it.<sup>94</sup> A party is not at liberty to serve an entire new case as an amendment, without special leave from the court.<sup>95</sup>

<sup>90</sup> Donahue v. Hicks, 21 How. Pr. 438.

<sup>91</sup> Van Bergen v. Ackles, 21 How. Pr. 314.

<sup>92</sup> Cal. Code Civ. Pro., § 650; see § 4897, *ante*; Estate of Lamb, 95 Cal. 397; *In re* Gates, 90 id. 257; Flagg v. Puterbaugh, 94 id. 134; Publishing Co. v. Mayne Co., 9 Utah, 318.

<sup>93</sup> Connor v. Morris, 23 Cal. 447; Bryam v. Maume, 28 id. 238; Kavanaugh v. Maus, id. 261.

<sup>94</sup> Id.

<sup>95</sup> Stuart v. Binsse, 4 Bosw. 616. The fact that no amendments were proposed to a draft of a bill of exceptions proposed by the appellant does not preclude the trial judge from amending the bill to conform to the facts. Hyde v. Boyle, 89 Cal. 590.



**§ 5036. Authentication of statement.** The statement, when settled by the judge, shall be signed by him, with his certificate that the same has been allowed and is correct; or the attorneys shall sign the same with their certificate that it has been agreed upon by them, and is correct. In either case, when settled or agreed upon, it shall be filed with the clerk.<sup>96</sup> A judge or judicial officer may settle and sign a bill of exceptions after as well as before he ceases to be such judicial officer.<sup>97</sup> If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the State, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the Supreme Court may, by its order or rules, direct.<sup>98</sup> This provision also applies to the settlement and certifying of statements.<sup>99</sup> The certificate of a judge is a sufficient authentication that the statement is substantially correct.<sup>100</sup> But a statement certified by the judge to be correct according to his recollection is not sufficient.<sup>101</sup> The authentication of the judge or attorneys should be indorsed on the engrossed statement.<sup>102</sup> A judge can revoke his certificate during the term at which judgment was rendered, but after the term he can not.<sup>103</sup> An authentication need not affirmatively show that the settlement was upon proper notice or in the presence of both parties. In the absence of evidence to the contrary, the presumption of law is in favor of the regularity of all official acts.<sup>104</sup>

**§ 5037. Authentication insufficient.** An indorsement by the judge at the bottom of a statement made in motion for a new

<sup>96</sup> Cal. Code Civ. Pro., § 650.

<sup>97</sup> Id., § 653.

<sup>98</sup> Id.

<sup>99</sup> Id. Where a suit is begun before a judge having charge of the equity cases arising in a county, and during its progress is transferred by him to another judge having charge of the jury cases, for the purpose of submitting certain questions of fact to the jury, the second judge acquires no jurisdiction of the suit, and, on appeal, the only judge authorized to certify a statement of facts is the one who originally assumed jurisdiction. *Hill v. Young*, 7 Wash. St. 33; see *Mich. Mfg. Co. v. Saunders*, id. 285.

<sup>100</sup> *Redman v. Gulnac*, 5 Cal. 148; *Battersby v. Abbott*, 9 id. 565.

<sup>101</sup> *Van Pelt v. Settler*, 14 Cal. 194.

<sup>102</sup> *Kimball v. Semple*, 31 Cal. 657.

<sup>103</sup> *Branger v. Chevalier*, 9 Cal. 172.

<sup>104</sup> *Battersby v. Abbott*, 9 Cal. 565.



trial, that the amendments to the statement were allowed, is not sufficient authentication.<sup>105</sup> So a clerk's certificate that a statement is the same which was used on motion for a new trial is entitled to no weight.<sup>106</sup> No mode of authentication is pointed out by the statute, and any satisfactory evidence that the statement has been examined and approved by the judge is sufficient.<sup>107</sup> An unauthenticated document purporting to be a statement on motion for new trial will be stricken from the transcript on appeal.<sup>108</sup> And if a second statement is afterwards brought up, duly certified, but defective, the two statements can not be used in connection.<sup>109</sup> Where a party appears and argues a motion for a new trial, it is a waiver of want of settlement and an authentication.<sup>110</sup>

§ 5038. **Correcting statement.** The Supreme Court will not amend a statement by adding thereto facts which occurred in the court below during the trial. The record in the Supreme Court must remain as settled in the court below.<sup>111</sup> A motion to correct a statement on exceptions is an original proceeding in the Supreme Court, and must be instituted by a petition in writing, which petition should be presented with the record and the application made before the case is submitted.<sup>112</sup> Orders which the Court of Appeals has no jurisdiction to review, and the papers upon which such orders were granted will be stricken out on motion.<sup>113</sup> But imperfections in form should be disregarded.<sup>114</sup>

<sup>105</sup> *Baldwin v. Ferre*, 23 Cal. 462.

<sup>106</sup> *Fee v. Starr*, 13 Cal. 170.

<sup>107</sup> *Kidd v. Laird*, 15 Cal. 161.

<sup>108</sup> *Kimball v. Semple*, 31 Cal. 657. A statement on appeal may be agreed to by the parties or their attorneys, and certified to by them as correct, or it may be certified to by the judge. But in all cases the statement on motion for a new trial must be certified to by the judge. *Raymond v. Thexton*, 7 Mont. 299.

<sup>109</sup> *Id.*; *Whitmore v. Shliverick*, 3 Nev. 288.

<sup>110</sup> *Dickinson v. Van Horn*, 9 Cal. 207; *Williams v. Gregory*, *id.* 76; see *Morris v. Angle*, 42 *id.* 236. Sufficiency of certification of statement. See *Miller v. Savings Bank*, 5 Wash. St. 200; *Small v. Geddis*, 4 *id.* 518; *Doyle v. McLeod*, *id.* 732; *McReavy v. Eshelman*, *id.* 757; *Tompson v. Lumber Co.*, 5 *id.* 527; *Kellogg v. Bradley*, 3 *id.* 429; *Schlaechter v. Miller*, 4 *id.* 463.

<sup>111</sup> *Satterlee v. Bliss*, 36 Cal. 489.

<sup>112</sup> *Wormouth v. Gardner*, 35 Cal. 227.

<sup>113</sup> *Smith v. Grant*, 15 N. Y. 590.

<sup>114</sup> *Ringgold v. Haven*, 1 Cal. 113.

§ 5039. **Engrossing statement.** Where amendments are made to a statement, a fair copy of the statement so amended must be made;<sup>115</sup> or where deeds or documentary evidence are directed to be inserted.<sup>116</sup>

§ 5040. **Objection to statement.** The place to object to immaterial matter in a statement is where it is made up and settled. If immaterial matter is introduced, and that fact is made to appear in the records, the party insisting on its introduction will be taxed with the costs of the immaterial matter.<sup>117</sup>

§ 5041. **Resettlement.** After a case has been once settled a resettlement of the case, restatement, and refinding of facts is not to be allowed.<sup>118</sup>

§ 5042. **Statement must be made.** A party appealing must make his case and have it settled with such statement of facts as will necessarily show the law is in his favor; if not, every intendment not unreasonable in itself will be against him.<sup>119</sup> A statement will not be regarded unless it is agreed to by the attorneys of the respective parties, or settled and authenticated by the court.<sup>120</sup> The settlement of a case is a judicial and not a ministerial act.<sup>121</sup> In New York the case must be settled by the court below, and be inserted in the record, and should contain, not the evidence, but only the conclusions of fact drawn

<sup>115</sup> *Marlow v. Marsh*, 9 Cal. 259; *Skillman v. Riley*, 10 id. 300; *Kimball v. Semple*, 31 id. 661.

<sup>116</sup> Id.; see § 4927, *ante*.

<sup>117</sup> *Kimball v. Semple*, 31 Cal. 658.

<sup>118</sup> *Catlin v. Cole*, 10 Abb. Pr. 389; *Bitting v. Vandenburg*, 17 How. Pr. 82.

<sup>119</sup> *Phelps v. McDonald*, 26 N. Y. 82; *Bissell v. Pierce*, 28 id. 252.

<sup>120</sup> *Kavanagh v. Maus*, 28 Cal. 261; *Osgrove v. Johnson*, 30 id. 509; *Burnett v. Pacheco*, 27 id. 408. Settlement of statement of facts under statutes of Washington. See *Warburton v. Ralph*, 9 Wash. St. 537; *Oliver v. Lewis*, id. 572; *Bowen v. Cain*, 7 id. 469; *Ward v. Haggins*, id. 617; *Watt v. O'Brien*, 6 id. 415; *In re Rossner*, 5 id. 488; *Snyder v. Kelso*, 3 id. 181; *King County v. Hill*, 1 id. 63; *Haas v. Gaddis*, id. 89. A statement can not be settled by the judge who tried the cause after he has gone out of office. *Gunderson v. Cochrane*, 3 Wash. St. 476; *Faulconer v. Warner*, 2 id. 525; *Coats v. Insurance Co.*, 4 id. 375. And a notice to appear and participate in the settlement on Sunday is ineffectual. *Cadwell v. First Nat. Bank*, 3 Wash. St. 188.

<sup>121</sup> *Fielden v. Lahens*, 14 Abb. Pr. 48.

from the evidence by the court below.<sup>122</sup> Where before settlement the judge who tried the case died, the case might be presented upon affidavits.<sup>123</sup> A writ of mandate may issue to compel a judge to settle a statement made on motion for a new trial in an insolvent case.<sup>124</sup>

§ 5043. **Settlement, effect of.** The Supreme Court can only look to the statement as settled by the court below, to determine the character and the point of the objection made on the trial to the introduction of proposed evidence. They can not consult the opinion of the judge in passing upon the motion for a new trial, to discover the real point of objection.<sup>125</sup> A case as settled is deemed to contain a true statement of the facts as found.<sup>126</sup> On appeal from an order granting or denying a new trial there is no necessity for preparing a statement on appeal, the statement on motion for new trial being sufficient.<sup>127</sup> A statement when agreed on by the parties should not probably be amended, except under a very clear showing of mistake or fraud.<sup>128</sup> A bill of exceptions when settled and filed becomes part of the judgment-roll.<sup>129</sup>

§ 5044. **Special proceedings.** The statute does not require the board of equalization to take down or preserve the evidence taken before them, nor does it make any provision for settling a statement of a trial before them, or a bill of exceptions taken during its progress; but doubtless some mode might be adopted to authenticate the evidence when required on appeal.<sup>130</sup> In

<sup>122</sup> *Reid v. Rensselaer Glass Factory*, 3 Cow. 387; *Feeter v. Heath*, 11 Wend. 479; *Melvin v. Leaycraft*, 17 id. 169; *People v. Superior Court*, 20 id. 663; *Easterly v. Cole*, 3 N. Y. 502. Settlement of statement under Nevada statutes. See *James v. Leport*, 19 Nev. 174; *Patchen v. Keeley*, id. 405.

<sup>123</sup> *Morse v. Evans*, 6 How. Pr. 445; but see Cal. Code Civ. Pro., § 653.

<sup>124</sup> *People v. Rosborough*, 29 Cal. 415.

<sup>125</sup> *Cochran v. O'Keefe*, 34 Cal. 557.

<sup>126</sup> *Hartman v. Proudfit*, 6 Bosw. 191.

<sup>127</sup> *Loucks v. Edmondson*, 18 Cal. 203. Settlement of statement on motion for new trial. See §§ 4897, 4898, *ante*; *Arnold v. Sinclair*, 12 Mont. 248; *Henry v. Merguire*, 106 Cal. 142; *Pico v. Cohn*, 78 id. 384.

<sup>128</sup> *Hutchinson v. Bours*, 13 Cal. 50.

<sup>129</sup> *Higgins v. Mahoney*, 50 Cal. 444; *Caldwell v. Parks*, 47 id. 640.

<sup>130</sup> *Central Pacific R. R. Co. v. Placer Co.*, 32 Cal. 582.

contested election cases, where the appellant assigns as error the improper rejection by the court below of the votes cast in his favor, and a statement is made part of the record, it is competent for the respondent, by way of amendment thereto, to incorporate in the statement the fact that other votes cast for him were likewise erroneously rejected by the court below.<sup>131</sup>

§ 5045. **Stipulation of attorneys.** Where counsel in a cause pending in the Supreme Court stipulate to submit the case to the court on two grounds only, it is a clear waiver of all other assignments of error, and they will not be allowed to go behind such stipulation, and insist upon points other than those mentioned in the stipulation.<sup>132</sup>

§ 5046. **Time for settlement.** Statements and exceptions should be speedily settled.<sup>133</sup> A case should be presented for settlement without unnecessary delay.<sup>134</sup> The bill of exceptions must be settled in time, or it will be stricken from the record.<sup>135</sup>

§ 5047. **Appeal from the judgment-roll.** When there is no statement on appeal it stands on the judgment-roll,<sup>136</sup> as on denial of motion for a new trial.<sup>137</sup> And in case of denial of motion for a new trial on the appeal from the judgment, the statement on motion for a new trial forms part of the record;<sup>138</sup>

<sup>131</sup> Webster v. Byrnes, 34 Cal. 273. Election contests are not to be tried *de novo* on appeal. Hughes v. Holman, 23 Oreg. 481; and see Feustermacher v. State, 19 id. 508.

<sup>132</sup> Cahoon v. Levy, 10 Cal. 216.

<sup>133</sup> Hutchinson v. Bours, 13 Cal. 50.

<sup>134</sup> Whiting v. Kimball, 6 Bosw. 690. Time for settlement of statement. See Patchen v. Keeley, 19 Nev. 404; Bank of Shelton v. Willey, 7 Wash. St. 535; McGlaulin v. Merriam, id. 111; Bartlett v. Reicheneker, 6 id. 168; Cogswell v. Railway Co., 5 id. 46.

<sup>135</sup> Cameron v. Sullivan, 15 Wis. 510; Lee v. Tillotson, 4 Hill, 27. Striking statement from record and grounds therefor. Northern, etc., R. R. Co. v. Coleman, 3 Wash. St. 228; Dittenhoeffer v. Clothing Co., 4 id. 519; McQuillan v. Seattle, 7 id. 331; Ward v. Tucker, id. 399; Am. Asphalt Co. v. Gribble, 8 id. 255; Savings, etc., Co. v. Jones, 9 id. 434; Griggs v. Mercantile Co., 14 Mont. 300; and see, also, § 4456, *ante*.

<sup>136</sup> Am. River Water & Min. Co. v. Bear River Water & Min. Co., 11 Cal. 340; McGill v. Rainaldi, id. 391; Newberg v. Henson, 12 id. 280.

<sup>137</sup> Burdge v. Gold Hill, etc., Water Co., 15 Cal. 198; McIntyre v. Willis, 20 id. 177.

<sup>138</sup> Solomon v. Reese, 34 Cal. 28; Towdy v. Ellis, 22 id. 651; Carpenter v. Williamson, 25 id. 154.

and may be used on appeal from the order.<sup>139</sup> An appeal may be taken from the judgment of the Superior Court without moving for a new trial in that court.<sup>140</sup> But on appeal from a judgment without a statement, nothing belongs to the record except the judgment-roll, and no question arising outside of the roll can be considered.<sup>141</sup> If a judgment by default was entered on a demurrer overruled, and the judgment-roll did not disclose what action was taken on the demurrer, the presumption is that the proceedings were regular.<sup>142</sup> On appeal from a judgment rendered on an appeal, or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below.<sup>143</sup> The appeal may be heard on the record, consisting of the order appealed from, and the affidavits identified in the mode prescribed by law.<sup>144</sup> Where the evidence is not set out in a statement on appeal, the court will presume that the court below had good reason for granting a new trial.<sup>145</sup> One who alleges error must rely on the record to disclose it,<sup>146</sup> as error will not be presumed.<sup>147</sup> Every intendment is in favor of a decision of the court below.<sup>148</sup> But where error is shown, the presumption is that appellant has been prejudiced by it, and it is incumbent on respondent to see that the record discloses the fact that appellant has not been so prejudiced.<sup>149</sup> Where the court tries the cause without a jury, the proper mode of reserving questions of law is to ask the court to decide them and note the refusal in a bill of exceptions.<sup>150</sup> To make an exception

<sup>139</sup> *Casgrave v. Howland*, 24 Cal. 457; *Waldron v. Murdock*, 23 id. 540; 83 Am. Dec. 135; see Cal. Code Civ. Pro., § 950.

<sup>140</sup> *Innis v. The Steamer Senator*, 1 Cal. 459; 54 Am. Dec. 305.

<sup>141</sup> *Wetherbee v. Carroll*, 33 Cal. 549.

<sup>142</sup> *Abadie v. Carrillo*, 32 Cal. 172. When the only error assigned is the judgment of dismissal of a complaint, which is substantially the sustaining of a demurrer thereto, there is no necessity for a bill of exceptions. *Long v. Billings*, 7 Wash. St. 257.

<sup>143</sup> Cal. Code Civ. Pro., § 951.

<sup>144</sup> *Wetherbee v. Carroll*, 33 Cal. 554.

<sup>145</sup> *Dickinson v. Van Horn*, 9 Cal. 207.

<sup>146</sup> *Waldie v. Doll*, 29 Cal. 555.

<sup>147</sup> *Dimick v. Campbell*, 31 Cal. 238.

<sup>148</sup> *Landers v. Bolton*, 26 Cal. 393; *People v. Quincy*, 8 id. 89; *De Johnson v. Sepulbeda*, 5 id. 149.

<sup>149</sup> *Norwood v. Kentfield*, 30 Cal. 393; *Jackson v. Feather River Water Co.*, 14 id. 18.

<sup>150</sup> *Griswold v. Sharpe*, 2 Cal. 17.

available, it must appear that the precise question intended to be raised was brought to the attention of the court below.<sup>151</sup>

§ 5048. **Bill of exceptions.** An appeal can be heard on a bill of exceptions taken at the trial if signed by the judge.<sup>152</sup> Appellant may have questions of law reviewed by making a statement of such rulings, with sufficient evidence to show their materiality, or may embody them in a bill of exceptions,<sup>153</sup> and only such orders and rulings as the appellant desires to have reviewed.<sup>154</sup> The Supreme Court of Nevada has never held it indispensable that a statement should be made in the court below of the grounds relied on upon appeal. The exceptions to the ruling of the court below will be treated as a substitute.<sup>155</sup> In the statute a statement and bill of exceptions on this subject mean the same thing.<sup>156</sup> An appeal from the judgment only brings under review such rulings on the trial as are duly excepted to.<sup>157</sup> Where no bill of exceptions has been filed, a judgment of the court below will not be disturbed for errors not apparent upon the record.<sup>158</sup> Where the ruling of the court appears on the record, a bill of exceptions is unnecessary.<sup>159</sup>

§ 5048a. **The same — continued.** An exception is a formal protest against the ruling of the court upon a question of law. And a bill of exceptions is a statement in writing, settled and signed by the judge, of what the ruling was, the facts in view of which it was made, and the protest of counsel;<sup>160</sup> there is no dif-

<sup>151</sup> *Walsh v. Wash. Ins. Co.*, 32 N. Y. 440.

<sup>152</sup> *De Johnson v. Sepulbeda*, 5 Cal. 149.

<sup>153</sup> *Hunt v. Bloomer*, 3 Kern. 341, 344; *Harper v. Minor*, 27 Cal. 107; *Treadwell v. Davis*, 34 id. 604; *Gates v. Walker*, 35 id. 289.

<sup>154</sup> *Harper v. Minor*, 27 Cal. 107.

<sup>155</sup> *Gillig v. Lake Bigler Road Co.*, 2 Nev. 214.

<sup>156</sup> *People v. Lee*, 14 Cal. 510.

<sup>157</sup> *Letter v. Putney*, 7 Cal. 423; *Castro v. Gill*, 5 id. 42; *Keyes v. Devlin*, 3 E. D. Smith, 518; *Gelston v. Hoyt*, 13 Johns. 561; *Coon v. Syracuse & Utica R. R. Co.*, 5 N. Y. 492; *Franklin v. Osgood*, 14 Johns. 527. For the principles on which the above rule is founded, see *Sands v. Hildreth*, 12 Johns. 493; *Ketchum v. Ewartson*, 13 id. 361; *Henry v. Cuyler*, 17 id. 469; *Colden v. Knickerbacker*, 2 Cow. 31; *Campbell v. Stakes*, 2 Wend. 146; *Haughton v. Starr*, 4 id. 179; *Wood v. Young*, 5 id. 620.

<sup>158</sup> *Scott v. Cook*, 1 Oreg. 24.

<sup>159</sup> *People v. Maguire*, 26 Cal. 635; *Cunningham v. Wheatley*, 21 Tex. 184; see following section.

<sup>160</sup> *People v. Torres*, 38 Cal. 141. See, as to object of bill of exceptions, *State v. Drake*, 11 Oreg. 396.

ference between a statement and bill of exceptions in form or substance, except that the former follows a notice of motion for a new trial.<sup>161</sup> In Idaho practice, a bill of exceptions settled and signed by the trial judge will be treated as such, although it is denominated a "statement."<sup>162</sup> In California practice, a bill of exceptions is equally applicable to any and all kinds of appeals provided for by the Code, and is to be preferred in practice to a statement of the case.<sup>163</sup> A bill of exceptions duly signed and sealed by the judge, and made a part of the record by his order, is a condition precedent to the right to ask a review of the judgment as to any question of fact.<sup>164</sup> When it is desired to attack a judgment because it has been rendered upon improper or insufficient testimony, or because the jury was not sufficiently and accurately instructed, it is indispensable that the evidence be preserved by a bill of exceptions.<sup>165</sup> If no exception to the judgment appealed from nor to any ruling or decision of the court below is preserved, the record does not present anything which can be the subject of review.<sup>166</sup> In other words, until such matter as constitutes no part of the record proper is put into a bill of exceptions, and is authenticated as required by law, the court can not receive it, because there is no legal evidence before the court that it contains a correct record of the proceedings.<sup>167</sup> If the error relied upon on appeal appear from the judgment-roll, no bill of exceptions is necessary.<sup>168</sup> And on an appeal made upon affidavits, or other written evidence, certified as the statute provides, no bill of exceptions is necessary.<sup>169</sup> But the stipulation of counsel that the testimony as taken by the

<sup>161</sup> *People v. Crane*, 60 Cal. 279; but see *Roundtree v. Galveston*, 42 Tex. 623.

<sup>162</sup> *Schultz v. Keeler*, 2 Idaho, 305; *United States v. Alexander*, id. 354; see *Puget Sound Iron Co. v. Worthington*, 3 Wash. Ter. 472.

<sup>163</sup> *Brandt v. Clarke*, 81 Cal. 634.

<sup>164</sup> *Miller v. Thorpe*, 4 Col. App. 559; *Burnell v. Wachtel*, id. 556; *Kimmins v. Lord*, 1 id. 221; *Belfeld v. Martin*, 4 id. 578; *Richardson v. Dunlop*, 26 Oreg. 270.

<sup>165</sup> *Hammond v. Bovee*, 4 Col. App. 269; also, *First Nat. Bank v. Leppel*, 9 Col. 594; *National Bank v. McCaskill*, 16 id. 408; *Rutter v. Shumway*, id. 95; *Patrick v. Weston*, 21 id. 73.

<sup>166</sup> Id.; *Estate of Smiley*, 4 Col. App. 582; *Burnell v. Wachtel*, id. 556.

<sup>167</sup> *State v. Drake*, 11 Oreg. 396; *State v. Chee Gong*, 17 id. 635; and see *State v. Foot You*, 24 id. 61.

<sup>168</sup> *State v. Mack*, 20 Oreg. 234.

<sup>169</sup> *Bailey v. Scott*, 1 S. Dak. 337; *Pleper v. Land Co.*, 56 Cal. 173.



court stenographer shall be the record in the case does not supply the place of a bill of exceptions duly authenticated and certified.<sup>170</sup>

§ 5049. **What a bill of exceptions should contain.** Documents and affidavits to be reviewed by the appellate court must be embodied in a bill of exceptions or record.<sup>171</sup> Writings, if not embodied in a bill of exceptions, should be unmistakably marked or identified, so as to leave no doubt as to what is referred to,<sup>172</sup> as affidavits in support of a motion,<sup>173</sup> or affidavits as to incompetency of a juror.<sup>174</sup> Affidavits used on motion to open the judgment form no part of the record, where there is no certificate of the clerk or admission of counsel that they were used for that purpose.<sup>175</sup> And to review intermediate orders on an appeal from the final judgment, such orders must be made a part of the record by a bill of exceptions.<sup>176</sup> An order striking out a statement on motion for a new trial can not be brought before the Supreme Court by a bill of exceptions.<sup>177</sup> It is not necessary to embody matter of record in a bill of exceptions.<sup>178</sup> A bill of exceptions stating "that thereupon plaintiff filed his certain motion, with affidavits attached, to set aside said verdict," does not refer to the affidavits so as to make them part of the record.<sup>179</sup> If a bill of exceptions made to an order dismissing a motion for a new trial recites the giving of a notice and the different steps taken in prosecuting the motion, it will be received as evidence of the facts recited, without including notice, statement, etc., in the transcript.<sup>180</sup>

<sup>170</sup> *McKenzie v. Ballard*, 14 Cal. 426; and see *Janeway v. Holston*, 19 Oreg. 97; *McQuaid v. Railroad Co.*, 19 id. 535.

<sup>171</sup> *Gates v. Buckingham*, 4 Cal. 286; *Ritter v. Mason*, 11 id. 214; *Moore v. Semple*, id. 360.

<sup>172</sup> *Lyons v. Thompson*, 16 Iowa, 62.

<sup>173</sup> *People v. Honshell*, 10 Cal. 83; *People v. Martin*, 32 id. 92; *Harman v. State*, 22 Ind. 331.

<sup>174</sup> *People v. Honshell*, 10 Cal. 86; affirming *People v. Stonecipher*, 6 id. 411.

<sup>175</sup> *Ritter v. Mason*, 11 id. 214.

<sup>176</sup> *Cornell v. Davis*, 16 Wis. 686.

<sup>177</sup> *Quivey v. Gambert*, 32 Cal. 304; see *Calderwood v. Peyser*, 42 id. 110.

<sup>178</sup> *De Johnson v. Sepulbeda*, 5 Cal. 149.

<sup>179</sup> *Moffit v. Rogers*, 15 Iowa, 453.

<sup>180</sup> *Warden v. Mendocino Co.*, 32 Cal. 655.



§ 5049a. **The same — continued.** Any matter *dehors* the record, relied on to destroy the presumptions in favor of the judgment, upon an appeal therefrom, must be embodied in a bill of exceptions.<sup>181</sup> As a rule the bill should make as short and succinct a statement of the evidence as possible, either in narrative form, giving its substance, or by stating what the evidence tended to establish.<sup>182</sup> No more of the testimony should be given than is necessary to explain the objection to be urged on appeal.<sup>183</sup> But in some instances it may be necessary to state the evidence by question and answer in order to lay before the court the exact statement of the witness, even though it may not be desired to point an exception, and it must be left largely to the discretion of the trial judge when settling the bill to determine the proper method to be pursued in any given case.<sup>184</sup> The appellant must make up his record so as to clearly show the basis for his points. And it is not sufficient that an objection by counsel at the trial recites certain facts.<sup>185</sup> A bill of exceptions which does not make a record of what actually happened upon the trial of the cause, but of what merely occurred on the hearing of a motion for a new trial, is not entitled to consideration.<sup>186</sup> But a statement on motion for a new trial and a bill of exceptions may be incorporated in one paper without invalidating either.<sup>187</sup> It was held that a paper attached to a bill of exceptions, and marked as an exhibit thereto, is not a part of the bill, and that the bill can not be aided by it.<sup>188</sup> But a bill of exceptions is to be read in connection with the record of which it forms a part, and a document set out in another part of the record, which is sufficiently identified as the one referred to in the bill of exceptions, may be deemed a part of it, and considered in passing upon the merits of an exception reserved by such bill.<sup>189</sup> Errors of law occurring on the trial

<sup>181</sup> *Caruthers v. Hensley*, 90 Cal. 559.

<sup>182</sup> *Cohen v. Wallace*, 107 Cal. 133; and see *Tucker v. Mills Co.*, 15 Oreg. 581; *State v. Clements*, 15 id. 237; *Hamilton v. Gordon*, 22 id. 557.

<sup>183</sup> *Flore v. Ladd*, 22 Oreg. 202.

<sup>184</sup> *Cohen v. Wallace*, 107 Cal. 133.

<sup>185</sup> *Williamson v. Tobey*, 86 Cal. 497; *Davis v. Baker*, 88 id. 106.

<sup>186</sup> *Walte v. Stroud*, 9 Wash. St. 333; and see *Goose River Bank v. Gilmore*, 3 N. Dak. 188.

<sup>187</sup> *Spottiswood v. Weir*, 66 Cal. 525.

<sup>188</sup> *France v. First Nat. Bank*, 3 Wyo. 187.

<sup>189</sup> *People v. Wallace*, 94 Cal. 494; *Railway Co. v. Wright*, 10 Oreg.

may be reviewed, although no specification of the particular errors of law on which the appellant relies is contained in the bill of exceptions.<sup>190</sup> Irrelevant matters incorporated into a bill of exceptions will not be considered upon the appeal.<sup>191</sup>

**§ 5050. Filing and settlement of bill of exceptions.** Bills of exceptions made during the progress of the trial should be written down, settled and signed by the judge, filed in the case, and be annexed to the judgment-roll.<sup>192</sup> A bill of exceptions may be filed by the judge at his own instance, and will in such case become a part of the record.<sup>193</sup> A bill of exceptions can not be filed by the judge after the time given, at least not without the consent of all parties.<sup>194</sup> The fact that a bill of exceptions was not signed until more than ten days after the trial can not defeat a party's right to appeal.<sup>195</sup> A certificate of the judge, made eight years after the trial, that he believed the exceptions were correctly noted in the clerk's minutes of testimony, can not supply the place of a bill of exceptions.<sup>196</sup> When it appears from the bill of exceptions, signed by the judge, that the motion for new trial was heard on statement, counter-statement, and affidavits, it can not be objected that the statement was not settled.<sup>197</sup> A bill of exceptions taken during the trial is a part of the judgment-roll.<sup>198</sup> Bills of exceptions settled after trial and judgment, though not technically a part of the judgment-roll, are filed by the clerk, and become part of the record on appeal.<sup>199</sup>

**§ 5050a. The same — jurisdiction.** The settlement of a bill of exceptions is a proceeding in an action.<sup>200</sup> And the duty and

162; *Caspary v. Portland*, 19 *id.* 500; 20 *Am. St. Rep.* 844. An exception is not preserved by a journal entry. *Cochrane v. Mining Co.*, 1 *Col. App.* 235; *German v. National Bank*, 16 *Col.* 244.

<sup>190</sup> *Reay v. Butler*, 69 *Cal.* 572; *Hagman v. Williams*, 88 *id.* 146; and see *Bridal Veil Lumber Co. v. Johnson*, 25 *Oreg.* 105.

<sup>191</sup> *Hyde v. Boyle*, 93 *Cal.* 1.

<sup>192</sup> *More v. Del Valle*, 28 *Cal.* 170; *People v. Empire G. & S. M. Co.*, 33 *id.* 173; *Wetherbee v. Carroll*, *id.* 553.

<sup>193</sup> *Shepherd v. Brenton*, 15 *Iowa*, 84.

<sup>194</sup> *Swinney v. Nave*, 22 *Ind.* 178.

<sup>195</sup> *People v. Martin*, 6 *Cal.* 477.

<sup>196</sup> *Castro's Exrs. v. Armesti*, 14 *Cal.* 38.

<sup>197</sup> *Williams v. Gregory*, 9 *Cal.* 76.

<sup>198</sup> *Cal. Code Civ. Pro.*, § 670.

<sup>199</sup> *Id.*, § 950.

<sup>200</sup> *Lukes v. Logan*, 66 *Cal.* 33; *Stonesifer v. Kilburn*, 94 *id.* 33.

power of settling statements and bills of exceptions rest generally and properly in the judge of the trial court, and the appellate court will not interfere with such statement or bill except in the case of a refusal by the judge to allow an exception.<sup>201</sup> And the legislature can not enjoin upon a private citizen the duty of settling a bill of exceptions, nor require a judge to continue to discharge judicial duties after his term of office has expired, though it may authorize him to settle such bill.<sup>202</sup> But *mandamus* will lie to compel the settlement of a bill of exceptions prepared in time, which the judge has improperly refused to settle.<sup>203</sup>

§ 5050b. The same — notice — time of settlement. The Montana statute (Laws Extra Sess. 1887, p. 82, § 5) requires notice to the adverse party of the presentation and settlement of a bill of exceptions.<sup>204</sup> So in California, under section 650, Code of Civil Procedure, a bill of exceptions prepared and settled after the trial must be prepared and served on the adverse party or counsel, who may offer amendments, and thereafter the bill is settled by the judge, on notice to the parties.<sup>205</sup> The notice provided for in this section of the Code is for the benefit of the adverse party, and may be waived by him.<sup>206</sup> Under Oregon

<sup>201</sup> *Colbert v. Rankin*, 72 Cal. 197; *Stratton v. Timber Co.*, 86 id. 352; *In re Yates*, 90 id. 257; *Hyde v. Boyle*, 89 id. 590; and see *In re Moore*, 78 id. 242; *Wheeler v. Fick*, 4 N. Mex. 36. Under statute of South Dakota (Comp. Laws, § 5068), when the death, disqualification or absence of the trial judge is shown to exist, it is the duty of the appellate court to direct some manner in which a bill may be settled, and this will generally be done by authorizing some other judge to act in the matter. *Severson v. Insurance Co.*, 3 S. Dak. 412.

<sup>202</sup> *Leach v. Aitken*, 91 Cal. 484.

<sup>203</sup> *Sansome v. Myers*, 80 Cal. 483; *Hicks v. Masten*, 101 id. 651; *Flagg v. Puterbaugh*, id. 583; *Leach v. Pierce*, 93 id. 624; *Che Gong v. Stearns*, 16 Oreg. 219. When *mandamus* will not lie. See *People v. Sullivan*, 61 Cal. 233; *Coffey v. Grand Council*, 87 id. 367; *Pacific Land Ass'n v. Hunt*, 105 id. 202. A writ of mandate lies to compel a referee to settle a statement on motion for a new trial in an action tried by him. *Careaga v. Fernald*, 66 Cal. 351; and see *Keane v. Murphy*, 19 Nev. 89; § 4897, *ante*. Sufficiency of petition for writ of mandate to compel settlement of bill of exceptions. *Walkerley v. Greene*, 104 Cal. 208; *Landers v. Lawler*, 84 id. 547; *Ausschlag v. Superior Ct.*, 76 id. 513; *Williard v. Dillard*, 86 id. 154.

<sup>204</sup> And see *McKay v. Railway Co.*, 13 Mont. 15.

<sup>205</sup> See *Kelleher v. Creclat*, 89 Cal. 38; *Hyde v. Boyle*, 93 id. 1.

<sup>206</sup> *Hicks v. Masten*, 101 Cal. 651.

practice, a bill of exceptions should be tendered to the judge immediately after the trial, unless the time therefor is extended, but the settlement and allowance thereof may be made at any reasonable time thereafter, according to the convenience of the judge.<sup>207</sup> The appellate court will not refuse to consider a bill of exceptions on the ground that it was not settled in time, unless it affirmatively appears from the record that the bill was not presented in time, or that the regular steps were not taken for its settlement.<sup>208</sup> The bill may be settled after an appeal has been taken.<sup>209</sup> In some jurisdictions provision is made for extension of time to settle bills of exception.<sup>210</sup> And an order made after statutory time has expired, settling a statement or bill, operates to extend the time for such settlement to the date thereof.<sup>211</sup> Such order may be *ex parte*.<sup>212</sup> An agreement of parties appearing in the record, that exceptions taken at the trial may be settled at another time, is sufficient to authorize the trial judge to settle a bill of exceptions or statement after the trial.<sup>213</sup> The judge has no authority to settle a bill of exceptions prepared and served after the expiration of the time limited by his admission to prepare and serve a proper draft in lieu of a previous skeleton bill, in the absence of a legal excuse for the neglect, and his action in refusing to settle such bill is correct.<sup>214</sup>

§ 5050c. **Signing — authentication.** A draught of a bill of exceptions must be authenticated by the signature or indorsement of the attorney presenting it, or of the party, if he appears in person. And unless such draught shows that it is one pre-

<sup>207</sup> *Ah Lep v. Gong Choy*, 13 Oreg. 205; and see *Holcomb v. Teal*, 4 id. 352.

<sup>208</sup> *Reay v. Butler*, 69 Cal. 572; and see *Jaffe v. Lillenthal*, 101 id. 175.

<sup>209</sup> *Reay v. Butler*, 69 Cal. 572.

<sup>210</sup> See *Moe v. Railroad Co.*, 2 N. Dak. 282; *Roy v. Union Mercantile Co.*, 3 Wyo. 417.

<sup>211</sup> *Edwards, etc., Lumber Co. v. Baker*, 2 N. Dak. 289.

<sup>212</sup> *Johnson v. Railroad Co.*, 1 N. Dak. 354; *contra*, *Taylor v. Derry*, 4 Col. App. 109; compare *Greig v. Clement*, 20 Col. 167.

<sup>213</sup> *Sebree v. Smith*, 2 Idaho, 329; see *Lockhart v. Rollins*, id. 503.

<sup>214</sup> *Visher v. Smith*, 92 Cal. 60; and see *Stonesifer v. Armstrong*, 86 id. 594; *Bunnel v. Stockton*, 83 id. 319. Time of settling and signing bill of exceptions under statute of New Mexico. See *Texas, etc., R. R. Co. v. Saxton*, 3 N. Mex. 282; *Evans v. Baggs*, 4 id. 147; *Jennison v. Boos*, id. 157.

pared and presented by a party to the cause, it need not be noticed as a paper upon which the judge or any of the counsel in the cause are called upon to act.<sup>215</sup> Under Colorado practice, bills of exception must be signed and sealed by the judge whose rulings are excepted to.<sup>216</sup> And a bill of exceptions can not be preserved by affidavits except in a case where, upon the presentation of a true bill, the judge "shall neglect or refuse to allow and sign and seal the same."<sup>217</sup>

§ 5050d. **The same — petition to prove.** Section 652, California Code of Civil Procedure, provides for a petition to the Supreme Court to prove an exception which the judge has refused to allow in accordance with the facts. But this provision does not confer upon the Supreme Court power to settle the bill or statement, and has no application, except where the judge has refused to allow an exception which he had the power to allow.<sup>218</sup> But it seems that the right to prove an exception involves the right, when necessary, to prove upon what the exception was based.<sup>219</sup> In an application to the Supreme Court under this section, the petition should set forth the exceptions taken and the evidence in support thereof, and notice of the application should be given to the trial judge.<sup>220</sup>

§ 5050e. **The same — presumptions.** Where the record on appeal does not show a settlement of the bill of exceptions, such fact will nevertheless be presumed from the signature of the

<sup>215</sup> Landers v. Lawler, 84 Cal. 547; and see Houghton v. Trumbo, 103 id. 239.

<sup>216</sup> Felchheimer v. Trounstiene, 12 Col. 282; Reed v. Cates, 11 id. 527; Hammond v. Bovee, 4 Col. App. 269; Pelton v. Bauer, id. 339; Marshall, etc., Min. Co. v. Kirtley, 8 Col. 108; and see Railroad Co. v. Marseilles, 107 Ill. 313.

<sup>217</sup> Diamond, etc., Min. Co. v. Faulkner, 17 Col. 9. Necessity of authentication of bill of exceptions. Howard v. Bowman, 3 Wyo. 311. Signing by judge in vacation. McBride v. Railway Co., 3 Wyo. 183. No statute in Oregon fixes the time within which a judge may sign a bill of exceptions. Che Gong v. Stearns, 16 Oreg. 219.

<sup>218</sup> Landers v. Landers, 82 Cal. 480; Vance v. Superior Ct., 87 id. 390; Tibbets v. Riverside Banking Co., 97 id. 258; Hyde v. Thornton, 83 id. 83.

<sup>219</sup> Jennings v. Brown, 109 Cal. 290; and see Vance v. Superior Ct., 87 id. 390.

<sup>220</sup> Estate of Hawes, 68 Cal. 413; Landers v. Landers, 82 id. 480; Estate of Biddel, 75 id. 229. When the application will be denied. Crow v. Minor, 85 Cal. 214; People v. Scott, 91 id. 563.

trial judge thereto attached.<sup>221</sup> In an application to the Supreme Court under the statute, to settle a bill of exceptions, on the ground that the trial judge refuses to settle the same in accordance with the facts, every presumption is in favor of the correctness of the bill as settled by the trial judge, and it will stand, unless the attacking party affirmatively shows its incorrectness.<sup>222</sup> So when the court refuses to give a charge requested, and the bill of exceptions does not contain the charge given by the court nor any exception thereto, the presumption is that the court correctly charged the jury, and that such charge covered the ground of the instruction requested.<sup>223</sup>

§ 5050f. **The same — striking from files.** A bill of exceptions not settled as provided by the statute will be stricken from the files.<sup>224</sup> But it is held that a bill of exceptions, although merely a transcript of the stenographer's notes and containing much immaterial matter, will not be stricken out, when it was allowed as a bill of exceptions without objection, and the error, if any, to be reviewed, is the granting of a nonsuit.<sup>225</sup>

§ 5051. **Exceptions to evidence.** An exception to admission of evidence, stating no grounds, will not be considered.<sup>226</sup> In a trial by the court the bill of exceptions must show what evidence was given on the trial, and the exceptions taken to the finding.<sup>227</sup> Exceptions will not be sustained which simply show that incompetent declarations were admitted in evidence, without showing what those declarations were.<sup>228</sup> A statement in a bill of exceptions, that the plaintiff offered in evidence a deed to him and others, conveying the demanded premises to the parties therein named, according to their respective interests, does not show whether the deed conveyed the land to the parties as tenants in common or in severalty.<sup>229</sup>

<sup>221</sup> *State v. Campbell*, 20 Nev. 122.

<sup>222</sup> *Baird v. Gleckler*, 3 S. Dak. 300; and see *Gilpin v. Gilpin*, 12 Col. 504.

<sup>223</sup> *Flint v. Nelson*, 10 Utah, 261.

<sup>224</sup> *Montana, etc., Produce Co. v. Howard*, 10 Mont. 296.

<sup>225</sup> *Johnston v. Railway Co.*, 23 Oreg. 94; distinguishing *Eaton v. Navigation Co.*, 22 id. 497.

<sup>226</sup> *Miller v. Duff*, 34 Wis. 167; *Voorman v. Voight*, 46 Cal. 392; *Tucker v. Jones*, 8 Mont. 232.

<sup>227</sup> *Concanon v. Blake*, 16 Wis. 518.

<sup>228</sup> *Hacket v. King*, 8 Allen, 144; 85 Am. Dec. 695. Mere general exceptions will not be considered. *Kleinschmidt v. Iler*, 6 Mont. 122; *Blackwell v. McLean*, 9 Wash. St. 301.

<sup>229</sup> *Page v. O'Brien*, 36 Cal. 559.

§ 5052. **Exceptions to findings.** A defective finding of facts is not a ground for reversing a judgment, when that defect is not noticed or complained of in the court below.<sup>230</sup> A defective specification of grounds, explaining the points of objection, is not cured by the assignments in the exceptions taken to the findings.<sup>231</sup>

§ 5053. **Exceptions to instructions.** It is the duty of appellant to incorporate instructions to which he objected in his bill of exceptions.<sup>232</sup> To enable the Supreme Court to pass upon the propriety of modified instructions, the instructions, as asked, should be before the court, and also the modifications, as made by the court below.<sup>233</sup> Exceptions to instructions given or refused by the court should be specific.<sup>234</sup>

§ 5054. **Exceptions to rulings.** Where an exception is taken to the decision of a court refusing a nonsuit, on settlement of the bill the plaintiff must see that all the evidence material for him is inserted in the bill of exceptions.<sup>235</sup> A trial before a referee should be conducted in the same manner as a trial before the court, and the evidence should be embodied in a bill of exceptions certified by the referee.<sup>236</sup> In a bill of exceptions, the words, "the foregoing was all the evidence given in the cause," are sufficient to exclude the presumption of other evidence.<sup>237</sup>

§ 5055. **Transcript on appeal.** It is the duty of the appellant to furnish the Supreme Court with a complete, clean, properly arranged, and properly authenticated transcript;<sup>238</sup> to at-

<sup>230</sup> McClusky v. Gerhauser, 2 Nev. 47. Exceptions to findings on Statute of Limitations. Dougall v. Schulenberg, 101 Cal. 154.

<sup>231</sup> Harper v. Minor, 27 Cal. 107.

<sup>232</sup> Hicks v. Britt, 21 Ark. 422; South. Pac. R. R. Co. v. Superior Court, 105 Cal. 84; Braverman v. Irrigation Co., 101 id. 644; Gilpin v. Gilpin, 12 Col. 504.

<sup>233</sup> Boies v. Henney, 32 Ill. 130.

<sup>234</sup> Baker v. McGinniss, 22 Ind. 257.

<sup>235</sup> Ringgold v. Haven, 1 Cal. 108; Dickenson v. Van Horn, 9 id. 210, 211. Exception to ruling of court upon a nonsuit. See Craig v. Water Co., 107 Cal. 675; Toulouse v. Pare, 103 id. 251.

<sup>236</sup> Goodrich v. City of Marysville, 5 Cal. 431; Phelps v. Peabody, 7 id. 52.

<sup>237</sup> Ford v. Mitchell, 21 Ind. 54; Estep v. Larsh, id. 183; Branham v. Bradford, 17 id. 47.

<sup>238</sup> Kimball v. Semple, 31 Cal. 657; see, also, Kellogg v. Mayer, 54 id. 583; Martin v. Hudson, 79 id. 612; Green v. McMann, 79 id. 561; Swasey v. Adair, 83 id. 136; Miskel v. Stone, 1 Wash. Ter. 229.



tend to clerical and typographical errors, and see that the transcript is a true copy of the original in all respects other than maps and surveys.<sup>239</sup> Pleadings, proceedings, and statement shall be chronologically arranged, and each transcript shall be prefaced with an alphabetical index to its contents, specifying the folio of each separate paper, order, or proceeding, and of the testimony of each witness, and the transcript shall have at least one blank fly-sheet cover.<sup>240</sup> It must be duly certified to be correct by the attorneys of the parties plaintiff and defendant, or by the clerk of the court from which the appeal is taken.<sup>241</sup> The object of this rule is to enable the attorneys to make up the record, and by omitting useless and superfluous matter save expense, facilitate the examination, and hasten the decision.<sup>242</sup> The transcript of records in civil cases must be printed.<sup>243</sup> The party filing the transcript, or the clerk of the court, may print the same, and the printed transcript, certified, shall be filed; and constitute the record of the cause in the appellate court.<sup>244</sup>

The Supreme Court rules of South Dakota contemplate a carefully prepared abstract or abstracts, which shall take the place of the original record, for the purpose of the hearing and decision of the case, which will be heard and decided upon the facts so presented, and the original papers will not be examined in the Supreme Court, except to settle a disagreement between abstracts. *Noyes v. Lane*, 2 S. Dak. 55; so, in Iowa, *Bailey v. Association*, 71 Iowa, 690; *Mielenz v. Quasdorf*, 68 id. 627. Exceptions, to be available to the appellant, must affirmatively appear in the abstract. *Peterson v. Siglinger*, 3 Iowa, 255. And if the abstract fails to show that an appeal has been taken, the Supreme Court will not assume jurisdiction, but will dismiss the appeal. *First Nat. Bank v. Elevator Co.*, 2 Iowa, 356; *Valley City, etc., Irrigation Co. v. Schone*, id. 344. Transcript under Colorado Appeal Act of 1895. See *South Boulder, etc., Reservoir Co. v. Reservoir Co.*, 8 Col. 429; *Buddee v. Spangler*, 12 id. 216; *Kester v. Jewell*, 15 id. 220; under Washington Appeal Act of 1890. See *Jones v. Jenkins*, 3 Wash. St. 17; *Tullis v. Shannon*, id. 716. Under Washington Appeal Act of 1893, the Superior Courts are not authorized to certify questions to the Supreme Court for decision. *Munson v. Mudgett*, 14 Wash. St. 662.

<sup>239</sup> *Franklin v. Goodman*, 31 Cal. 458.

<sup>240</sup> Cal. Sup. Ct. rule 8.

<sup>241</sup> Cal. Sup. Ct. rule 2; Cal. Code Civ. Pro., § 953.

<sup>242</sup> *Estate of Boyd*, 25 Cal. 511.

<sup>243</sup> As to directions, see Cal. Sup. Ct. rule 7.

<sup>244</sup> Cal. Sup. Ct. rule 12. A transcript should not be filed unless it complies with the rules of the appellate court. *Faut v. Tandy*, 7 Mont. 443. And refusal to consider an appeal will be warranted where the transcript fails to comply therewith. *Brownell v. McCor-*



§ 5056. **Filing transcript.** In all cases where an appeal has been perfected the transcript shall be filed within forty days.<sup>245</sup> The time may be extended by stipulation, but the court can not extend it more than twenty days.<sup>246</sup> If not filed within the time prescribed, the appeal may be dismissed on motion made during the first week of the term, without notice.<sup>247</sup> It has been held by the United States Supreme Court that the general rule that transcript of record must be filed, and the case docketed at the term next succeeding the appeal, has, however, exceptions; as where appellant is prevented from seasonably obtaining the transcript, by fraud of the other party, or by the ill-founded order of the court below.<sup>248</sup> Under the statute of Iowa, it is the duty of the appellant to file a perfect transcript.<sup>249</sup>

§ 5057. **Service of transcript.** As soon as practicable after being printed, and at or before the time of filing the same, a printed copy shall be served on the attorney of the adverse party, and if there be more than one adverse party, on the attor-

mick, 7 Mont. 12. Mutilation of the transcript will not be tolerated. *Faut v. Tandy*, 7 Mont. 443. And no hearing will be permitted on a transcript which has a useless index. *Mason v. McLean*, 6 Wash. St. 31.

<sup>245</sup> Cal. Sup. Ct. rule 2.

<sup>246</sup> Id.

<sup>247</sup> Id. *Time of filing transcript.*—Consult *Somers v. Somers*, 83 Cal. 621; *Bethell v. Rogers*, 100 id. 175; *Bush v. Gelsey*, 16 Oreg. 267; *McCarty v. Wintler*, 17 id. 391; *Judkins v. Taffe*, 21 id. 89; *Chemin v. East Portland*, 19 id. 512; *Cook v. Albina*, 20 id. 190; *Sebree v. Smith*, 2 Idaho, 327; *Fahey v. Belcher*, id. 1076; *Mahony v. Marshall*, id. 1065. Failure to file transcript in time is ground for dismissal of appeal, but such failure may be excused for cause shown. *Westhelmer v. Thompson*, 2 Idaho, 1137; *Crawford v. Haller*, 2 Wash. Ter. 161; *Miller v. Savings Bank*, 5 Wash. St. 200; *Smith v. Arthur*, id. 356; *Bast v. Hysom*, id. 88; *State v. Wilson*, 7 id. 502; *Judge v. Ohm*, 89 Cal. 134; *Chapman v. Bank of California*, 88 id. 419; *Emeric v. Alvarado*, 106 id. 646. Extension of time to file transcript. *Desmond v. Faus*, 83 Cal. 134; *Grant v. De Lamori*, 71 id. 329; *Bush v. Gelsey*, 16 Oreg. 267; *Kelley v. Pike*, 17 id. 330. Stipulation extending such time. See *Wittram v. Crommelin*, 72 Cal. 89; *Poupion v. Muzio*, 68 id. 235; *Wood v. Forbes*, 62 id. 37. The Montana statute prescribing the time in which the transcript on appeal shall be filed is directory and not mandatory. *Territory v. Hanna*, 5 Mont. 247; *Territory v. Mackey*, 8 id. 172.

<sup>248</sup> *United States v. Gomez*, 3 Wall. 752; see, also, *Thompson v. Blanchard*, 2 N. Y. 561.

<sup>249</sup> *Hall v. Smith*, 15 Iowa, 584.

- ney of each party appearing by attorney.<sup>250</sup> A failure of such service is not a ground for dismissing the appeal if reasonable diligence is used; but respondent may object to a hearing at the first term if service is not made in time for him to prepare for argument.<sup>251</sup> Service should be made before or at the time of filing, and if the transcript is printed by the clerk, the appellant should direct the clerk to forward him copies as soon as printed for service.<sup>252</sup> Besides the original, there shall be filed seventeen copies of the transcript, and points and authorities, and statement of facts, which copies shall be distributed by the clerk as prescribed by law.<sup>253</sup>

§ 5058. **What the transcript must contain.** On appeal from a final judgment, the appellant must furnish the court with a copy of the notice of appeal, of the judgment-roll, and of any bill of exceptions or statement in the case upon which the appellant relies. Any statement used on motion for new trial, or settled after decision of such motion, when the motion is made upon the minutes of the court,<sup>254</sup> or any bill of exceptions settled,<sup>255</sup> or used on motion for a new trial, may be used on appeal from a final judgment equally as on appeal from the order granting or refusing a new trial.<sup>256</sup> On appeal from a judgment rendered on an appeal or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment, or order appealed from, and of papers used on the hearing in the court below.<sup>257</sup> On an appeal from an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the order appealed from, and of the papers designated in section 661 of the Code.<sup>258</sup> These copies

<sup>250</sup> Cal. Sup. Ct. rule 11.

<sup>251</sup> Estate of Boyd, 25 Cal. 512.

<sup>252</sup> Id.

<sup>253</sup> Cal. Sup. Ct. rule 2, subd. 6. See rules of the Supreme Court of California, adopted in 1892; Lang v. Specht, 62 Cal. 145.

<sup>254</sup> As provided in Cal. Code Civ. Pro., § 661.

<sup>255</sup> As provided in Id., §§ 649, 650.

<sup>256</sup> Cal. Code Civ. Pro., § 950.

<sup>257</sup> Id., § 951. If the transcript does not contain the judgment from which the appeal purports to be taken, the appeal can not be entertained. Savings, etc., Society v. Meeks, 66 Cal. 371; People v. Sing Lum, 60 id. 6. The statement in the bill of exceptions that a judgment was rendered can not supply the place of the judgment itself. Yuma County v. Lovell, 20 Col. 80.

<sup>258</sup> Id., § 952.

must be arranged in their chronological order, and to them must be added, in cases in which it is necessary, an assignment of errors, and a stipulation of the attorneys, or the certificate of the clerk, that the transcript is correct, and that the necessary bond on appeal has been given, or that the same has been waived by stipulation.

**§ 5059. Form of stipulation.**

*Form No. 1163.*

It is hereby agreed that the foregoing transcript contains a full, true, and correct copy of all papers necessary and proper to be used on this appeal; that the appeal herein was duly perfected and the requisite undertaking on appeal was given and filed within the time prescribed by law [or that an undertaking on appeal is hereby expressly waived by the respondent]; that the foregoing is a full, true, and correct transcript, and that the appeal herein may be heard thereon.

A. B., Attorney for Appellant.

C. D., Attorney for Respondent.

**§ 5060. Affidavits and documents.** Affidavits or documents copied into the transcript, but not certified by the clerk or judge, or not presented by statement or bill of exceptions, can not be considered.<sup>259</sup> So of affidavits used on motion to open the judgment;<sup>260</sup> nor the affidavit of one of the attorneys, showing the objections made to the selection of the jury.<sup>261</sup> The certificate of the judge, of the matters read or referred to, where documents and depositions were used on a motion for new trial, will be sufficient identification of the documents and depositions used;<sup>262</sup> and a copy of such papers used on the hearing of the motion must be furnished.<sup>263</sup> So, on a review of an order, on motion to dismiss a complaint on specified grounds.<sup>264</sup> Affidavits filed in opposition to an application for an injunction

<sup>259</sup> Gordon v. Clark, 22 Cal. 534; 83 Am. Dec. 82; Stone v. Stone, 17 Cal. 513; People v. Honshell, 10 Id. 83. A mere marking of the affidavits by the clerk of the court, as having been read on the hearing is not a sufficient record on appeal. Von Glahn v. Brennan, 81 Cal. 261; and see White v. White, 88 Id. 429.

<sup>260</sup> Ritter v. Mason, 11 Cal. 214.

<sup>261</sup> Magee v. Mok. Hill Canal & Min. Co., 5 Cal. 258.

<sup>262</sup> Loucks v. Edmondson, 18 Cal. 203; Walden v. Murdock, 23 Id. 549.

<sup>263</sup> Same authorities, and Bodley v. Ferguson, 25 Cal. 584.

<sup>264</sup> Freeborn v. Glazier, 10 Cal. 337.

are part of the record, and may be considered, though not embraced in the statement.<sup>265</sup>

**§ 5061. Copy of map.** The appellate court does not examine the original transcript in the clerk's office, unless it contains the only copy of a map or survey.<sup>266</sup> But one copy of any map or survey need be furnished.<sup>267</sup>

**§ 5062. Findings.** Where a cause is tried by a judge alone, the record should disclose a finding by him of the facts, and a statement of his conclusions of law upon the facts.<sup>268</sup> The decision of the court must be given in writing and filed with the clerk, and the facts found and conclusions of law must be separately stated. Findings of fact, however, may be waived by the parties.<sup>269</sup>

**§ 5063. Judgment-roll.** If the transcript does not contain all the judgment-roll, but contains all that is necessary, the defect is waived by stipulation that it contains all that is necessary for the purpose of the appeal.<sup>270</sup> But the transcript should

<sup>265</sup> *Gagliardo v. Crippin*, 22 Cal. 362. Facts which ought to appear in a statement of facts properly settled, signed and authenticated, can not, when controverted, be established in the Supreme Court by affidavits or other proof. *State v. Hinchey*, 5 Wash. St. 326; and see *Clauton v. Coward*, 67 Cal. 373.

<sup>266</sup> *Franklin v. Goodman*, 31 Cal. 458.

<sup>267</sup> Cal. Sup. Ct. rule 9.

<sup>268</sup> *Hoagland v. Clary*, 2 Cal. 474; see § 4634, *ante*.

<sup>269</sup> See Cal. Code Civ. Pro., §§ 632-634; § 4655, *ante*.

<sup>270</sup> *Solomon v. Reese*, 34 Cal. 28. What constitutes judgment-roll. See § 4760, *ante*. An appeal will not be dismissed by reason of a defective judgment-roll, when all the portions of the roll are before the appellate court which are requisite to a full determination of the cause. *Paige v. Roeding*, 89 Cal. 69. If it be contended that the judgment-roll is defective or lacking in material parts, the omitted documents, if properly certified, may be brought before the appellate court, and it will determine what constitutes the judgment-roll. *Paige v. Roeding*, 96 Cal. 389. An order substituting a party is part of judgment-roll. *Kittle v. Bellegarde*, 86 Cal. 556. Appearance of attorney is not a part thereof. *Lyons v. Roach*, 84 Cal. 27; nor is a stipulation. *Savings Union v. Myers*, 76 Cal. 624; *Spreckels v. Ord*, 72 id. 86; nor bill of particulars nor instructions of court. *Paris v. Raynor*, 76 Cal. 647; nor a notice of motion for judgment on the pleadings. *Prescott v. Grady*, 91 Cal. 518; nor affidavits used on motion to discharge attachment. *Bowring v. Bowring*, 4 Utah, 185; *Windt v. Baurriza*, 7 Wash. St. 867; nor proceedings relating to appointment of guardian *ad litem*. *Batchelder v. Baker*, 79

always contain enough of the record of the court below to fully present the question, and show the materiality of the point relied on to reverse the judgment or order; and generally, whenever a pleading or other paper has been necessarily used on the hearing by the court below, a copy of the pleading or an agreed statement of the contents of so much, at least, as is relevant to the point in issue should be furnished in the transcript.<sup>271</sup> The fact that a record is erroneous in stating that the parties waived a jury can not be shown by an affidavit of the judge who tried the cause.<sup>272</sup>

§ 5064. **Motions.** A motion is no part of a record, and its indorsement by the judge as "correct" does not make it so.<sup>273</sup>

§ 5065. **New trial.** On appeal from an order denying a new trial, the appellant is only required to furnish copies of the notice of appeal, order appealed from, and of the papers used on the hearing of the motion.<sup>274</sup> Subsequent decisions seem, however, to require more. Evidence of service of the notice of motion must be contained in the record, or it must clearly appear that service was waived.<sup>275</sup> The transcript must also contain an authenticated copy of the pleadings, or an agreed statement of their contents;<sup>276</sup> or such pleadings, depositions, and minutes as were read or referred to on the hearing, identified by the certificate of the judge, and the affidavits and state-

Cal. 286. But a motion to strike out part of a pleading is held to be part of the judgment-roll. *Bank of Commerce v. Fuqua*, 11 Mont.

285. It is only the finding of a referee upon the whole issue that must stand as the finding of the court, and form part of the judgment-roll. *Faulkner v. Hendy*, 103 Cal. 151.

<sup>271</sup> *McQuade v. Whaley*, 29 Cal. 614. The record on appeal must show a foundation in fact for the points made. *Williamson v. Tobey*, 86 Cal. 497; *Davis v. Baker*, 88 id. 106. It is not sufficient that an objection by counsel at the trial recites certain facts. *Id.*

<sup>272</sup> *Smith v. Brannan*, 13 Cal. 115.

<sup>273</sup> *Thompson v. Buckenstos*, 1 Oreg. 17.

<sup>274</sup> *Wakeman v. Coleman*, 28 Cal. 58; see § 4967, *ante*; *Ingerman v. Moore*, 90 Cal. 410. A notice of a motion for a new trial forms no part of the record on appeal. *Richardson v. City of Eureka*, 92 Cal. 64; *Afferbach v. McGovern*, 79 id. 268; unless incorporated in the statement or bill of exceptions. *Alpers v. Schammel*, 75 Cal. 590; *Perkins v. McDowell*, 3 Wyo. 328.

<sup>275</sup> *Calderwood v. Brooks*, 28 Cal. 151; *Gum v. Murray*, 6 Mont. 10.

<sup>276</sup> *McQuade v. Whaley*, 29 Cal. 612.

ment upon which the motion was made.<sup>277</sup> There is no necessity of preparing a statement on appeal from an order granting or refusing a new trial, the statement on motion for new trial being sufficient.<sup>278</sup> It is not necessary in all cases to bring up the pleadings in full. A summary will, in most cases, answer every purpose on appeal, if it be agreed to by the attorneys of the parties.<sup>279</sup> When the only point is as to whether the statement was filed in time, it is not necessary to insert the statement itself on the record.<sup>280</sup> If a new trial has been denied, on the ground that the evidence is insufficient to sustain the cause of action, an authenticated copy or an agreed statement of the pleadings must be included in the transcript.<sup>281</sup> An appellate court will not consider an order on motion for a new trial, when the motion, judgment, and pleadings are only presented to it by a bill of exceptions.<sup>282</sup> An appeal was taken from a judgment of nonsuit, and an order denying a motion for a new trial. The transcript on appeal consisted of the statement on motion for a new trial, and a stipulation that said motion was denied, that the appeal was duly taken and perfected, and "that the foregoing transcript is correct:" it was held that in the absence of the pleadings, or a statement of the issues, this court can not ascertain whether the court below erred in granting the nonsuit, and the judgment will be affirmed.<sup>283</sup>

§ 5066. **Notice of appeal.** The transcript must show that notice of appeal has been duly served upon the other side.<sup>284</sup> A waiver of the filing by stipulation of the parties is not equivalent to the filing of the notice; for consent, though it may waive error, can not confer jurisdiction.<sup>285</sup>

<sup>277</sup> *Wetherbee v. Carroll*, 33 Cal. 549. Where the record does not disclose that the statement used upon motion for new trial was ever settled, it can not be considered on appeal. *Springville v. Fullmer*, 7 Utah, 454.

<sup>278</sup> *Loucks v. Edmondson*, 18 Cal. 203.

<sup>279</sup> *Todd v. Winants*, 36 Cal. 129.

<sup>280</sup> *Harper v. Minor*, 27 Cal. 108.

<sup>281</sup> *McQuade v. Whaley*, 29 Cal. 612; *Wetherbee v. Carroll*, 33 id. 549; *Craig v. Fry*, 68 id. 363.

<sup>282</sup> *N. O. R. R. Co. v. Albritton*, 38 Miss. 242.

<sup>283</sup> *Todd v. Winants*, 36 Cal. 129.

<sup>284</sup> *Franklin v. Reiner*, 8 Cal. 340; *Western Pacific R. R. Co. v. Reed*, 35 id. 621; *Tootle v. French*, 2 Idaho, 745; *Carr v. State*, 1 Kan. 331.

<sup>285</sup> *Bonds v. Hickman*, 29 Cal. 463; *Low v. Rice*, 8 Johns. 409; *Carr v. State*, 1 Kan. 331.

§ 5067. **Order after judgment.** On an appeal from an order after judgment, the transcript should contain a copy of the order appealed from, and copies of all papers used on the hearing.<sup>286</sup> And if based on affidavits and other evidence, it must contain a statement made and settled in the mode prescribed for the making and settling statements on appeals from final judgments.<sup>287</sup>

§ 5068. **Order based on evidence.** When an appeal is from an order based on evidence other than affidavits, the record consists of the order appealed from and a statement prepared and settled, containing so much of said evidence as is necessary to present the points relied on.<sup>288</sup> The appellate court can not reverse a judgment for want of sufficient evidence to sustain the verdict, unless the record shows that all the material evidence is before it.<sup>289</sup>

§ 5069. **Pleadings.** On an appeal from a final judgment, the transcript must contain a copy of the pleadings.<sup>290</sup> Attorneys may agree as to the contents of the pleadings, and introduce into the transcript such agreement, instead of printing the entire pleadings.<sup>291</sup> But if an amended complaint or answer is filed, and no question arises on the original pleadings, it is not necessary to include them in the transcript.<sup>292</sup> A statement of the contents of pleadings not agreed to by the opposite attorney, or included in the settled statement, though placed in the transcript, constitutes no part of the record.<sup>293</sup>

§ 5070. **Separate appeals.** When defendants take separate appeals, and sign distinct bonds, one transcript will suffice.<sup>294</sup> Where one of the parties in an action appeals, and another party in the same action takes another and independent appeal,

<sup>286</sup> Cal. Code Civ. Pro., § 951; *Glidden v. Packard*, 28 Cal. 649; and see *Miller v. Lux*, 100 Id. 609.

<sup>287</sup> *Wetherbee v. Carroll*, 33 Cal. 549. Identification of affidavits used on hearing. *Purdy v. Montgomery*, 77 Cal. 326.

<sup>288</sup> Id.; see § 5067, *ante*.

<sup>289</sup> *State v. Bonds*, 2 Nev. 265.

<sup>290</sup> Cal. Code Civ. Pro., § 950; *Hart v. Plum*, 14 Cal. 148.

<sup>291</sup> This course should be pursued in all cases where no point is made on them. *McQuade v. Whaley*, 29 Cal. 612.

<sup>292</sup> *Marriner v. Smith*, 27 Cal. 649.

<sup>293</sup> *McQuade v. Whaley*, 29 Cal. 612.

<sup>294</sup> *Baham v. Langfield*, 16 La. Ann. 156.



neither party, in the appellate court, can refer to the transcript in the other appeal for the facts, without a stipulation to that effect. Each appeal must be heard on its own record.<sup>295</sup>

§ 5071. **Statement.** Where the transcript does not contain any statement or grounds of appeal, and no assignments of errors or brief are filed, the appeal will be dismissed.<sup>296</sup> No portion of a statement can be omitted except on stipulation of the other party.<sup>297</sup> Where a copy of an order certified by the clerk, sustaining a demurrer to a replication, together with the judgment-roll, were filed, but there was no statement or bill of exceptions, the action of the court below on the demurrer could not be reviewed.<sup>298</sup>

§ 5072. **Stipulations.** A stipulation signed by the attorneys of the parties, that "the foregoing transcript is correct," does no more than take the place of the clerk's certificate that the papers to which it is annexed are true copies.<sup>299</sup> It does not

<sup>295</sup> *Gates v. Walker*, 35 Cal. 289.

<sup>296</sup> *Fowler v. Harbin*, 23 Cal. 631; *Hoadley v. Crow*, 22 id. 265. An appeal must be prosecuted and determined on the record. *Luthe v. Luthe*, 12 Col. 429. Without a transcript on file the appellate court is without jurisdiction. *Swope v. Smith*, 1 Okl. 283. And see, as to result of deficient transcript, *Hunt v. Qhmertez*, 15 Col. 447; *Barger v. Halford*, 10 Mont. 57; *Starr v. Mining Co.*, 6 id. 485; *Riborado v. Mining Co.*, 2 Idaho, 131; *Murphy v. Fuld*, id. 161; *Purdum v. Taylor*, id. 153. When a party fails to file the transcript within the time limited by law, the right of appeal is lost until an order is obtained extending the time for filing. A second appeal can not be taken. *Nestuesa Road Co. v. Landingham*, 24 Oreg. 439. If the transcript is on file when notice of motion is given to dismiss the appeal, it defeats the motion; if filed after the notice is given, the motion is not defeated, but circumstances to excuse the default may be shown by affidavit. *Carter v. Paige*, 77 Cal. 64; see § 5079b, *post*. Papers on appeal in causes of equitable cognizance. See *McKinnon v. Kingston Land, etc., Co.*, 4 Wash. St. 535; *State v. Allyn*, 2 id. 470; *Metzler v. James*, 9 Col. 115.

<sup>297</sup> *Kimball v. Semple*, 31 Cal. 657.

<sup>298</sup> *Bostwick v. McCorkle*, 22 Cal. 669. This case was overruled in *Smith v. Lawrence*, 38 Cal. 28; 99 Am. Dec. 344, where it is said that when a demurrer is sustained and the pleading demurred to is amended, the amendment operates as an acquiescence in the decision on the demurrer; but that a refusal to amend can not be deemed an acquiescence in the decision; and neither a bill of exceptions nor statement is required where the record already presents the question of law and the decision of the court.

<sup>299</sup> *Todd v. Winants*, 36 Cal. 129.



preclude respondents from denying the correctness or sufficiency of the bill of exceptions.<sup>300</sup> Where there is in the transcript a stipulation by the parties that "the plaintiff duly excepted" to the "charges and each part thereof," it will be construed as a stipulation that the exceptions were sufficiently specified to render them available.<sup>301</sup>

**§ 5073. Undertaking.** The appellant must show that the required undertaking on appeal has been given, either by inserting a copy of the undertaking in the transcript, or by stating in the stipulation of the attorneys or in the certificate of the clerk that the undertaking has been filed, and the time of filing the same.<sup>302</sup>

**§ 5074. What transcript should not contain.** Nothing is included in the record of a suit but the judgment-roll.<sup>303</sup> Such parts of the judgment-roll as are of no use for the purposes of the appeal should be omitted;<sup>304</sup> or such matters as do not tend in some degree to illustrate the points made on appeal.<sup>305</sup> A judgment in another case, which is not made part of the complaint or answer by averment, and was not one of the papers on the hearing of motion to grant or dissolve an injunction, though printed in the transcript, is no part of the record.<sup>306</sup> When an appeal is taken on the judgment-roll alone, and no statements made, a specification of grounds of error is not required to be inserted in the transcript. But when the court comes to examine the case, and no brief or statement of points

<sup>300</sup> *Wetherbee v. Carroll*, 33 Cal. 549.

<sup>301</sup> *Bowman v. Cudworth*, 31 Cal. 148. The transcript in each case should contain in it all the matter which is to be determined, and counsel should not attempt to impose their work upon the appellate court, by stipulating that all pertinent evidence contained in the transcript in another cause should be considered as if embodied in the new trial statement in the case in which the stipulation is made. *Spangler v. San Francisco*, 84 Cal. 12.

<sup>302</sup> *Bryan v. Berry*, 8 Cal. 130; *Wakeman v. Coleman*, 28 *id.* 58. The undertaking on appeal is not one of the papers required to be set out in the transcript by sections 950, 951 and 952, California Code of Civil Procedure, and should not be embodied therein. *Railroad Co. v. Anderson*, 77 Cal. 297.

<sup>303</sup> *Sharp v. Daugney*, 33 Cal. 505. Constituents of judgment-roll, See § 5063, *ante*.

<sup>304</sup> *Solomon v. Reese*, 34 Cal. 28.

<sup>305</sup> *Estate of Boyd*, 25 Cal. 511.

<sup>306</sup> *Sanchez v. Carriaga*, 31 Cal. 170.

and authorities is furnished on the part of the appellant to aid in the investigation, as required by the rules of the Supreme Court, the judgment will be affirmed without any examination of the case.<sup>307</sup> A party can not incorporate in his transcript *ex parte* affidavits impeaching the statement, and after the final submission of the case bring the question before the Supreme Court for the first time in his brief.<sup>308</sup>

§ 5075. **Hearing on appeal.** After the record is fully made up and printed, and certified to by the county clerk of the proper county, or by the attorneys, it is called the transcript; and upon a deposit of fifteen dollars with the clerk of the Supreme Court, it is filed, and the case goes regularly on the calendar of that court, and is called in its order at the next term thereafter. Generally the causes in the Supreme Court are submitted on briefs; and it is deemed the better practice to do so unless the case involve some new or important principle, and even then an oral argument, however able or convincing, is necessarily forgotten before the case is taken up to be decided by the court, as months often elapse before it can be reached in its order. To understand the practice in the Supreme Court of California, as well as of the highest courts in any of the other states, a full knowledge of the rules of such courts must be acquired.<sup>309</sup> This is especially important in the practice in the United States District, Circuit, and Supreme Courts.

Where no briefs are filed within the time specified, when the cause is submitted on briefs to be filed, and the transcript contains no assignment of error, judgment will be affirmed.<sup>310</sup> If

<sup>307</sup> Hutton v. Reed, 25 Cal. 487; see Batchelder v. Baker, 79 id. 266; Bedan v. Turney, 99 id. 649.

<sup>308</sup> Wormouth v. Gardner, 35 Cal. 227.

<sup>309</sup> Rules of court are but a means to accomplish the ends of justice, and it is always in the power of the court to suspend its own rules, or except a particular case from their operation whenever the purposes of justice require it. Pickett v. Wallace, 54 Cal. 148; Sullivan v. Wallace, 73 id. 307; People v. Demasters, 105 id. 669. Rules of procedure should be liberally construed. Smith v. Whittier, 95 Cal. 279; and see Warner v. Cleaning Works, 105 id. 409. But courts, as well as members of the bar, should respect the same, and regulate their conduct in conformity therewith. Martin v. De Loge, 15 Mont. 343; and see Shain v. Lumber Co., 89 Cal. 120.

<sup>310</sup> Hutton v. Reed, 25 Cal. 488; Holm v. Roach, id. 37; Edmondson v. Alameda Co., 24 id. 349; Hickinbotham v. Monroe, 28 id. 489; Drexler v. Tobacco Co., 78 id. 624; Farls v. Lampson, 73 id. 190. In

the appellant insists, in his brief, that the respondent must recover the whole amount sued for or nothing, the court will not decide whether the judgment was entered for a proper sum.<sup>311</sup> While the uncontradicted statements of counsel in his brief can not be taken as part of the record, still they may be referred to as tending to show that the inference drawn from a record is not unfounded.<sup>312</sup> Points upon which appellant relies should be made in his opening brief.<sup>313</sup> The points of counsel should be consistent with each other. Counsel can not claim there was a bill of sale to the opposite party for the purpose of excluding evidence of a verbal sale, and then insist that the bill of sale was void.<sup>314</sup>

general, it is inexpedient and contrary to good practice to attempt to review a cause, except so far as counsel give assistance by brief and argument. *Townsend v. Ditch Co.*, 17 Cal. 142. As to the time of filing briefs and the practice thereon, consult Cal. Sup. Court rule 2; *Shain v. People's Lumber Co.*, 98 Cal. 120; *Peck v. Peck*, 75 id. 298; *Campodonico v. Oreg. Imp. Co.*, 85 id. 218; *Cronkhite v. Bothwell*, 3 Wyo. 739; *Lumber Co. v. Cole*, 1 Wash. St. 330; *In re Guardianship, etc.*, 7 id. 421; *Gregory v. Diggs*, 108 Cal. 123; *National Bank v. McKinney*, 1 S. Dak. 78.

<sup>311</sup> *Moore v. Murdock*, 26 Cal. 514.

<sup>312</sup> *Hood v. Hamilton*, 33 Cal. 698.

<sup>313</sup> *Hihn v. Courtis*, 31 Cal. 398; *Kelly v. McCormick*, 28 N. Y. 318.

<sup>314</sup> *Patterson v. Keystone Min. Co.*, 30 Cal. 360. Where counsel prints in his brief a document which is not part of the record on appeal, the court may, as against him, treat the document as properly before it. *Estate of Cahill*, 74 Cal. 52. It is a reprehensible breach of duty for counsel to insert in their briefs any reflections upon the judge of the court below, and should not be tolerated. *Sharp v. Hoffman*, 79 Cal. 404; *Brownell v. McCormick*, 7 Mont. 12. But the motion to strike a brief on this ground should point out the objectionable language. *Littlejohn v. Miller*, 5 Wash. St. 399. See, also, as to striking brief from records, *State v. Oleson*, 9 Wash. St. 186; *Sheehan v. Levy*, 1 id. 149. Expense of brief. See *Land Co. v. Dibble*, 6 Wash. St. 165. Amendment of brief. See *State v. Carter*, 8 Wash. St. 272. It is not the duty of the appellate court to search the record for errors not specifically pointed out or discussed in the appellant's brief. *West v. Crawford*, 80 Cal. 19; and see *Wheelock v. Godfrey*, 100 id. 578; *Neylan v. Green*, 82 id. 128. And where the brief of counsel for the appellant is substantially a mere recapitulation of the general assignments of error as they appear in the bill of exceptions, giving no reasons why the court erred, and citing no authorities, and, upon a cursory view of the record, no material error is noticed, the judgment will be affirmed. *Gavin v. Gavin*, 92 Cal. 292.

§ 5076. **Errors in the record, how amended.** Errors in dates, in copies of documents, in the description of premises taken for conveyances, and the like, can be corrected by a resettlement; and upon proper showing, made before argument, the Supreme Court may send the record back to the court below for that purpose. So, where the errors are admitted.<sup>315</sup> And irrelevant portions of the case may be stricken out, or matter improperly inserted.<sup>316</sup> But the Supreme Court can not amend a complaint so as to make it correspond with the verdict.<sup>317</sup> Motion for amendment after return filed should be made to the Court of Appeals in the first instance.<sup>318</sup> But a mere clerical error in a judgment, not affecting the appellant, can be corrected, and is not ground for reversal.<sup>319</sup> If no motion is made in the court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the Supreme Court at appellant's cost.<sup>320</sup> The appellate court may order a document to be inserted in or stricken from the transcript, in order to perfect it, but it can not amend the document itself.<sup>321</sup>

§ 5077. **Argument of counsel.** No more than two counsel on a side will be heard upon the argument, except in peculiar and important cases.<sup>322</sup> The counsel for the appellant shall be entitled to open and close the argument.<sup>323</sup> The appellant is confined in his argument to the objections urged in the court below.<sup>324</sup> The respondent may suggest any ground to show

<sup>315</sup> *People v. Romero*, 18 Cal. 90.

<sup>316</sup> *Smith v. Grant*, 15 N. Y. 590; *Brown v. Saratoga R. R. Co.*, 18 id. 495.

<sup>317</sup> *Hooper v. Wells*, 27 Cal. 11; 85 Am. Dec. 211.

<sup>318</sup> *Adams v. Bush* (No. 3), 2 Abb. Pr. (N. S.) 118.

<sup>319</sup> *Anderson v. Parker*, 6 Cal. 197.

<sup>320</sup> *Tryon v. Sutton*, 13 Cal. 490. Neglect of appellee to file amended abstract. See *Daniels v. Carpet Co.*, 15 Cal. 56.

<sup>321</sup> *Bonds v. Hickman*, 29 Cal. 460.

<sup>322</sup> Cal. Sup. Ct. rule 18. Privilege of oral argument on final hearing. *De Votie v. McGerr*, 14 Cal. 577; *Butler v. Rockwell*, 17 id. 290.

<sup>323</sup> Cal. Sup. Ct. rule 18; *Benham v. Rowe*, 2 Cal. 387; 56 Am. Dec. 342.

<sup>324</sup> *Clarke v. Huber*, 25 Cal. 593; *Edgerton v. Thomas*, 5 Seld. 42; *Belknap v. Seeley*, 4 Kern. 143; *Durgin v. Ireland*, id. 322; *Codd v. Rathbone*, 19 N. Y. 87; *Savage v. Cook*, 17 Abb. Pr. 403; *Stewart v. Smith*, 14 id. 75. Where the transcript discloses a subject-matter of appeal, of which no mention is made in the briefs of counsel, it will be assumed by the appellate court that the questions involved

that the ruling of the court below was right, whether the grounds suggested were advanced in the court below or not.<sup>325</sup> Or he may insist on a point properly presented, although it was not urged in the trial of the cause.<sup>326</sup> When counsel assume a certain principle advanced as correct law, and the court decides the case upon this assumption, without discussing its correctness, the opinion is not authority that such assumption is correct law.<sup>327</sup>

§ 5078. **Objections to the transcript.** Exceptions or objections to the transcript or statement, the bond or undertaking on appeal, the notice of appeal or its service, or any technical objection or exception to the record, affecting the right of the appellant to be heard on the points of error assigned, must be taken and noted in the printed points of respondent, required to be filed and served under the rules of the Supreme Court.<sup>328</sup> The objection that it does not appear in the transcript when the statement or motion for new trial was filed in the court below must be made in the Supreme Court, before a submission of the case on the merits, or it will be deemed waived.<sup>329</sup> If a case is submitted on its merits by consent of counsel, the submission, even if made before the day the case is set for argument, is a waiver of technical objections to the transcript.<sup>330</sup> If the transcript can not be made out, by reason of the loss of a portion of the records of the case, it is the duty of the appellant to move the court below, at the earliest possible time, to supply the lost papers by some means under its control;<sup>331</sup> as by copies from the original.<sup>332</sup> That the transcript of a record in a case on appeal is incomplete can not be shown by certificate of the clerk.<sup>333</sup>

in it have been abandoned. *Tuller v. Arnold*, 98 Cal. 522; *Webber v. Clarke*, 74 id. 11.

<sup>325</sup> *Clarke v. Huber*, 20 Cal. 196.

<sup>326</sup> *Kidd v. Teeple*, 22 Cal. 255.

<sup>327</sup> *Donner v. Palmer*, 31 Cal. 500.

<sup>328</sup> Cal. Sup. Ct. rule 13. So of the objection that it does not contain all that is required by section 346 of the California Practice Act (which corresponds to sections 950 to 954 of the Code of Civil Procedure). *Solomon v. Reese*, 34 Cal. 28.

<sup>329</sup> *Ross v. Roadhouse*, 36 Cal. 580.

<sup>330</sup> *St. John v. Kidd*, 26 Cal. 263.

<sup>331</sup> *Buckman v. Whitney*, 24 Cal. 267.

<sup>332</sup> *Buckman v. Whitney*, 28 Cal. 555.

<sup>333</sup> *The Grapeshot*, 7 Wall. 563.

In case of a stipulation of attorneys, that "the foregoing transcript is correct," the respondent's objections to the sufficiency of the transcript are not waived by his failing to take exception thereto, according to rule 13 of this court.<sup>334</sup> On an appeal from a judgment by default against a nonresident, an objection that the record does not contain the affidavit on which an attachment in the suit issued is not well taken.<sup>335</sup> If a part of the judgment appealed from is omitted in the record, the Supreme Court may require it to be supplied on the suggestion of the diminution of the record;<sup>336</sup> or the appellant may suggest a diminution of the record, and obtain an order directing the clerk of the court below to certify a copy of the undertaking not shown by the transcript to have been filed.<sup>337</sup> The fact that the record is erroneous can not be shown by an affidavit of the judge who tried the cause.<sup>338</sup> It will require a strong showing to justify the court to permit additions to the transcript of matters before deliberately omitted.<sup>339</sup> The Supreme

<sup>334</sup> *Todd v. Winants*, 36 Cal. 129; see *Harnish v. Bramer*, 71 id. 155.

<sup>335</sup> *Dow v. Whitman*, 36 Ala. 604. On an appeal from a judgment by default not taken within sixty days after the entry of judgment, nothing can be reviewed except what appears on the judgment-roll. *Savings, etc., Society v. Meeks*, 66 Cal. 371.

<sup>336</sup> *McGarrahan v. Maxwell*, 28 Cal. 75; *Sharon v. Sharon*, 79 id. 633.

<sup>337</sup> *Wakeman v. Coleman*, 28 Cal. 58.

<sup>338</sup> *Smith v. Brannan*, 13 Cal. 107. As to the practice in correcting errors or defects in the transcript, see Cal. Sup. Ct. rule 12; *McGregor v. Comstock*, 19 N. Y. 581; *Paige v. Roeding*, 96 Cal. 388; *Fagan v. Carty*, 77 id. 352; *Lee Chuck v. Quan Wo Chong Co.*, 81 id. 222; *Ingerman v. Moore*, 90 id. 410; *Territory v. Harris*, 7 Mont. 429. Although the court may disapprove the manner of taking an appeal, yet, if counsel make no objection, the defect will not be considered. *Boyd v. Slayback*, 63 Cal. 493. Unauthorized reconstruction of record. See *McDonald v. Shreve*, 12 Mont. 82. A motion in the appellate court to strike out portions of the transcript, upon the ground that they are no part of the record, is not proper practice, and will be denied. If the matters sought to be stricken out form no part of the record, they will not be considered by the court upon the hearing of the case upon its merits. *Sutton v. Symons*, 97 Cal. 475. Striking documents from record under Washington practice. See *Chapin v. Blake*, 4 Wash. St. 1; *Medcalf v. Bush*, id. 386; *King County v. Hill*, 1 id. 63. Bill of exceptions not stricken from record, when. *Parrott v. Kane*, 14 Mont. 23. Dismissal of appeal for insufficiency of transcript. *Miller v. Thomas*, 78 Cal. 509. Colorado Supreme Court practice as regards defective records. See *Pleyte v. Pleyte*, 15 Col. 44.

<sup>339</sup> *Ketchum v. Crippen*, 31 Cal. 305.

Court has no authority to correct the records in the lower courts. Applications to correct errors in the records of Superior Courts, if any exist, must be made in lower courts.<sup>340</sup> Where there is a substantial defect in the appeal, the objection may be taken at any time before judgment.<sup>341</sup> If the defect of jurisdiction appear on the transcript it can not be cured by amendment, as consent of parties will not confer jurisdiction on appeal.<sup>342</sup> But when a case is brought up on appeal for the second time, it is too late to object that the court had not jurisdiction to try the first appeal.<sup>343</sup>

§ 5078a. **Authentication of papers.** Without a statutory provision authorizing the authentication of copies of papers in some other way, the only proper way that they can be brought into the record upon appeal and identified is by bill of exceptions or statement.<sup>344</sup> Although the transcript on appeal may be properly certified, yet where the bill of exceptions accompanying it is a detached paper, without authentication, the appellate court will ignore the errors shown in the bill.<sup>345</sup> The certificate that the statement in a cause of equitable cognizance contains all the material facts, is sufficient without alleging that it contains the exceptions taken to the reception or rejection of testimony, when it does not appear that any material matter has been omitted from the statement.<sup>346</sup> In the authentication of papers to be used on appeal, the policy of the statute is to restrict the authority of the clerk to the record of the case.<sup>347</sup>

§ 5078b. **Printing record.** Under a statute of New Mexico (Comp. Laws, § 2201), requiring the record on appeal to be printed where the amount in controversy exceeds one thou-

<sup>340</sup> *Boston v. Haynes*, 31 Cal. 107; *Roe v. Superior Ct.*, 60 id. 93.

<sup>341</sup> *Denedle, Ex'x, v. Archer*, 8 Pet. 526; *Owings v. Kincannon*, 7 id. 399; *Wilson v. Life & Fire Ins. Co.*, 12 id. 140.

<sup>342</sup> *Mordecal v. Lindsay*, 19 How. (U. S.) 200; *Montgomery v. Anderson*, 21 id. 386; *Ballance v. Forsyth*, id. 389.

<sup>343</sup> *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 413; *Sizer v. Many*, 16 id. 98.

<sup>344</sup> *Herrlich v. McDonald*, 80 Cal. 472; *Somers v. Somers*, 81 id. 608; see § 5048a, *ante*; and compare *Miller v. Lux*, 100 Cal. 609.

<sup>345</sup> *Stinson v. Sachs*, 8 Wash. St. 391; and see *Richwine v. Jones*, 140 Ind. 289.

<sup>346</sup> *Tompson v. Lumber Co.*, 5 Wash. St. 527.

<sup>347</sup> *Thompson v. Lake*, 19 Nev. 293.



sand dollars, the court has no right to compel the printing where the amount involved is less than that sum.<sup>348</sup>

**§ 5078c. Transcript — fees and costs.** The written transcript in civil cases may be filed with the clerk of the court if when presented for filing, it be accompanied with sufficient funds to pay the expenses of printing, and the clerk, upon receipt thereof, shall cause the transcript to be printed, etc.<sup>349</sup> It is held that this rule should be strictly enforced and obeyed as written, and that a deposit of the transcript with the clerk, without the funds necessary to pay for the printing, is not in compliance with the rule.<sup>350</sup> Washington Appeal Act of 1891 made it the duty of the clerk to transcribe all the papers on the taking of an appeal, and fees therefor must be allowed in the Supreme Court, although much of the matter may be unnecessary for the hearing on appeal.<sup>351</sup> Where the appellant himself prepares the transcript and is charged only half price by the clerk for examining and certifying the same, he can recover as costs merely the sum paid to the clerk, and is entitled to nothing on account of his own labor upon the transcript.<sup>352</sup> In case of a judgment reversed, additional costs will not be imposed on the respondents on account of their inserting in the transcript a large amount of unnecessary matter, since by the reversal they will be required to pay the expenses of printing the same.<sup>353</sup>

**§ 5079. Dismissal of appeal.** If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed on motion, upon notice given. If the transcript, though not filed within the time prescribed, be on file at the time the notice of motion is given, that fact shall be a sufficient answer to the motion.<sup>354</sup> An appeal will be dismissed in certain cases

<sup>348</sup> *Mora v. Schick*, 4 N. Mex. 158; *Deemer v. Falkenburg*, id. 57.

<sup>349</sup> Cal. Sup. Ct. rule 12.

<sup>350</sup> *Ward v. Healey*, 110 Cal. 587.

<sup>351</sup> *Soules v. McLean*, 7 Wash. St. 451.

<sup>352</sup> *Tingley v. Boom Co.*, 5 Wash. St. 644.

<sup>353</sup> *In re Robinson*, 106 Cal. 493.

<sup>354</sup> Cal. Sup. Ct. rule 2; see § 5071, n., *ante*; *Gregory v. Diggs*, 108 Cal. 123; *Smith v. Trefry*, 71 id. 404; *Whartenby v. Reay*, 92 id. 74; *Judge v. Ohm*, 89 id. 134; *Hoyt v. Railroad Co.*, 87 id. 610; *Coffey v. Grand Council*, id. 370; *Buckley v. Althorf*, 86 id. 643; *Smith v. Solomon*, 84 id. 537; *Owen v. Going*, 13 Col. 290; *Tustin v. McFar-*



where documents offered in evidence below are not found in the record;<sup>355</sup> or for want of assignment of errors.<sup>356</sup> But if the order of dismissal is procured by any fraud or imposition practiced on the court or the opposite party, the Supreme Court will recall the *remittitur*, stay the proceedings, and assert its jurisdiction, even after the adjournment of the term.<sup>357</sup> No appeal shall be dismissed for insufficiency of the undertaking thereon, provided that a good and sufficient undertaking, approved by a judge of the Supreme Court, be filed in the Supreme Court before the hearing, upon motion to dismiss the appeal.<sup>358</sup> In case the filing of notice of appeal did not precede the filing of the undertaking, the appeal will be dismissed, but usually without prejudice to a second appeal.<sup>359</sup> So because the undertaking was not filed within five days after notice of appeal filed.<sup>360</sup> Where the appellant's appeal has been imperfectly made or settled, it will be, on motion, dismissed;<sup>361</sup> or where the appeal is defective for want of jurisdiction;<sup>362</sup> or where the order or decree appealed from is unappealable;<sup>363</sup>

land, 4 Wash. St. 103; *Higgins v. Burns*, 2 id. 372; *Illuminating Co. v. Needham*, id. 450; *Oreg. Railway, etc., Co. v. O'Brien*, 3 Wash. Ter. 21; *Savings Bank v. Morgan*, 9 Utah, 369; *Bonesteel v. Fairchild*, id. 371. For proceedings on motion to dismiss, consult Cal. Sup. Ct. rule 6; *Pio v. Algeltinger*, 97 Cal. 81; *Cochrane v. Gunderson*, 10 Wash. St. 326.

<sup>355</sup> *Hall v. Beggs*, 17 La. Ann. 130.

<sup>356</sup> *Brooks v. Townsend*, 4 Cal. 286; *Savage v. Maresch*, 3 Wash. Ter. 259; *Frazier v. Venen*, id. 392.

<sup>357</sup> *Rowland v. Kreyenhagen*, 24 Cal. 52; *Martinez v. Galardo*, 5 id. 155.

<sup>358</sup> Cal. Code Civ. Pro., § 954.

<sup>359</sup> *Carpentier v. Williamson*, 24 Cal. 609; 85 Am. Dec. 84; *Dooling v. Moore*, 19 id. 81.

<sup>360</sup> *Gordon v. Wansey*, 19 Cal. 82.

<sup>361</sup> *Livingston v. Radcliff*, 2 N. Y. 189; *Sturgis v. Merry*, id. 189; *King v. Dennis*, id. 189; *Colle v. Brown* 1 N. Y. Code Rep. 416; *Hunt v. Bloomer*, 13 N. Y. 341; *Johnson v. Whitlock*, id. 344; *Zabriskie v. Smith*, 1 id. 480.

<sup>362</sup> *Pugsley v. Kesselbergh*, 10 N. Y. 420; *Wiggins v. Tallmadge*, 7 How. Pr. 404; *Lallette v. Van Keuren*, id. 409.

<sup>363</sup> *Smith v. White*, 23 N. Y. 572; *Moore v. Westervelt*, 1 N. Y. Code Rep. 415; *Walte v. Van Allen*, 22 N. Y. 319; *Genin v. Tompson*, 1 N. Y. Code Rep. 415; *Ely v. Holton*, 15 N. Y. 595; *McAllister v. Albion Plank Road Co.*, 10 id. 353; *Matter of Canal and Walker Streets*, 12 id. 406; *N. Y. Cent. R. R. Co. v. Marvin*, 1 id. 276; *Adams v. Fox*, 27 id. 640; *Wiggins v. Talmadge*, 7 How. Pr. 404; *Lahens v. Fielden*, 15 Abb. Pr. 177.

or where the appeal is brought too late, or prematurely;<sup>364</sup> or where no regular case is presented.<sup>365</sup> Where an appeal originally good is lost by change in the law, it will be dismissed on motion;<sup>366</sup> or where an appeal is brought in bad faith, or in violation of a stipulation;<sup>367</sup> or where, pending the appeal, the controversy had been settled;<sup>368</sup> or where, by enforcement of a portion of the judgment, appellant had waived his right to appeal;<sup>369</sup> or where appellant has no right to appeal at all.<sup>370</sup> But that appellant has no interest in the subject-matter of the suit is no ground for dismissal, even on a second appeal after judgment reversed.<sup>371</sup>

In case of a second appeal, where the costs of the first appeal have not been paid, appeal will be stayed until the costs are paid.<sup>372</sup> Where the appellant does not furnish the papers necessary to inform the court of the nature of the appeal, the cause will be dismissed.<sup>373</sup> Where appellant failed to file a transcript of the record showing that an appeal has been perfected, and respondents filed an affidavit that the appeal was taken for

<sup>364</sup> *Bank of Geneva v. Hotchkiss*, 5 How. Pr. 478; *Wells v. Danforth*, 7 id. 197; *Woolen Mfg. Co. v. Townsend*, 1 N. Y. Code Rep. 415; *McMahon v. Harrison*, 5 How. Pr. 360; *Mills v. Shult*, 2 E. D. Smith, 139. Dismissal for delay. *Borderre v. Den*, 106 Cal. 594; *Mattingly v. Pennie*, 105 id. 514; *Bunting v. Saltz*, 84 id. 168; *Hammond v. Wallace*, 85 id. 522; *Smith v. Westerfield*, 88 id. 374; *McLaughlin v. Menotti*, 89 id. 354; *Langan v. Langan*, 89 id. 186; *Kirwan v. Hunnewill*, 91 id. 157; *Himebaugh v. Crouch*, 3 S. Dak. 409; *Citizens' Bank v. Crouch*, id. 410; *Ryan, etc., Cattle Co. v. Murdock*, 8 Utah, 497. Laches of both parties not ground for dismissal, when. *Tripp v. Duane*, 86 Cal. 149. An appeal taken before the judgment is entered of record is premature, and must be dismissed. *Home of Inebriates v. Kaplan*, 84 Cal. 486; and see *Bartlett v. Reichennecker*, 5 Wash. St. 369.

<sup>365</sup> *Westcott v. Thompson*, 16 N. Y. 613; *Hunt v. Bloomer*, 13 id. 341; *Johnson v. Whitlock*, id. 344; *Otis v. Spencer*, 16 id. 610; *Ingersoll v. Bostwick*, 22 id. 425.

<sup>366</sup> *Gale v. Wells*, 7 How. Pr. 191; *Porter v. Jones*, id. 192.

<sup>367</sup> *Townsend v. Masterson Stone Dressing Co.*, 15 N. Y. 587.

<sup>368</sup> *Shank v. Shoemaker*, 18 N. Y. 489; *Smith v. Hart*, 11 How. Pr. 203.

<sup>369</sup> *Bennett v. Van Syckel*, 18 N. Y. 481.

<sup>370</sup> *Matter of Bristol*, 16 Abb. Pr. 397.

<sup>371</sup> *Ricketson v. Compton*, 23 Cal. 636.

<sup>372</sup> *Dresser v. Brooks*, 5 How. Pr. 75. Costs of appeal. See *Cramer v. Tittle*, 79 Cal. 332; *Loftus v. Fischer*, 113 id. 286; *Dalbckermeyer v. Scholtes*, 3 S. Dak. 183; § 5078c, *post*.

<sup>373</sup> *Sun Mut. Ins. Co. v. Dwight*, 1 Hilt. 50.

delay, the appeal was dismissed, with ten per cent. damages.<sup>374</sup> On an appeal from an order denying a new trial, appellant failing to furnish Supreme Court with a copy of the papers used on hearing the motion, appeal will be dismissed on motion.<sup>375</sup> On motion to dismiss an appeal, on the ground that an undertaking on appeal is not shown in the transcript, appellant may suggest a diminution of the record, and obtain an order directing the clerk of the court below to certify a copy of the undertaking to the appellate court.<sup>376</sup> Where the undertaking is sufficient to render the appeal effectual, but is not sufficient to operate as a stay, respondent may move for leave to proceed in the judgment, but not to dismiss the appeal.<sup>377</sup> Where an appeal has been dismissed for want of a proper bond, and no final judgment rendered, a second appeal can be taken at any time within the period allowed by law.<sup>378</sup> A motion to dismiss an appeal, on the ground that the transcript was not filed within the time required by the California Supreme Court rules, is too late after the case has been submitted.<sup>379</sup> A dismissal of an appeal, from failure to file the record within the time required, is not an affirmance of the judgment.<sup>380</sup> If the appellant neglects to file a brief within the time fixed, and the transcript contains no assignment of errors, except the general one that the order or judgment appealed from is not warranted by the evidence, the appeal, on motion, will be dismissed.<sup>381</sup> A defendant who appeared separately, and was not served with notice of appeal, or made a party to any proceedings subsequent to the judgment, can not move to dismiss an appeal taken by

<sup>374</sup> *Buckley v. Stebbins*, 2 Cal. 149; fifteen per cent. awarded in *De Witt v. Porter*, 13 Cal. 171; twenty per cent. in *Nickerson v. Cal. Stage Co.*, 10 Cal. 520; twenty-five per cent. in *McKeon v. Millard*, 47 Cal. 583. Upon the dismissal of an appeal for want of prosecution, in giving judgment against the sureties upon the appeal bond damages will not be allowed when no showing of special damages has been made by the respondent. *Cady v. Case*, 10 Wash. St. 140.

<sup>375</sup> *Bodley v. Ferguson*, 25 Cal. 584; see, also, *People v. Baker*, 39 id. 686.

<sup>376</sup> *Wakeman v. Coleman*, 28 Cal. 58.

<sup>377</sup> *Dobbins v. Dollarhide*, 15 Cal. 374.

<sup>378</sup> *Martinez v. Gallardo*, 5 Cal. 155; *Columbet v. Pacheco*, 46 id. 650.

<sup>379</sup> *Cook v. Klink*, 8 Cal. 347.

<sup>380</sup> *United States v. Gomez*, 23 How. (U. S.) 326.

<sup>381</sup> *Williams v. Hall*, 24 Cal. 156.

another defendant.<sup>382</sup> An appeal will be dismissed if a copy of the notice of appeal is served before the day on which the original is filed.<sup>383</sup>

Mere delay is no ground for dismissal on appeal,<sup>384</sup> nor that an appeal is sham and frivolous.<sup>385</sup> Appeal will not be dismissed for clerical errors in the record;<sup>386</sup> nor because the security was not sufficient to entitle the party to a *supersedeas*;<sup>387</sup> but if the appellant has become possessed of all the appellee's interest, appeal will be dismissed.<sup>388</sup> A motion to dismiss an appeal will not be entertained, even upon the ground that the appeal is frivolous, until after the time for filing the transcript has expired.<sup>389</sup> On an appeal from a judgment and an order denying a new trial, the undertaking recited the judgment, but no mention was made of the order. The appeal from the order was dismissed for want of an undertaking, and the appeal from the judgment was dismissed because not taken within one year.<sup>390</sup> Where the record showed that no appeal had been taken by reason of failure to serve notice of appeal in time, a motion to dismiss the appeal will be denied.<sup>391</sup>

§ 5079a. **The same — continued.** The appellate court will dismiss an appeal of which it has no jurisdiction.<sup>392</sup> An appeal will be dismissed when it appears that the judgment has been satisfied;<sup>393</sup> so when it is shown by satisfactory evidence

<sup>382</sup> *Blanc v. Rodgers*, 47 Cal. 606.

<sup>383</sup> *Buffendeau v. Edmondson*, 24 Cal. 94; but see Cal. Code Civ. Pro., § 940.

<sup>384</sup> *Dey v. Walton*, 2 Hill, 403.

<sup>385</sup> *Ricketson v. Compton*, 23 Cal. 636; *Dey v. Walton*, 2 Hill, 403; *Rogers v. Hoosack*, 5 id. 521. To dismiss an appeal is to refuse to consider its merits, and, therefore, there can be no dismissal on the ground that the appeal is frivolous or without merit. *People v. McNulty*, 95 Cal. 594. Where it is evident that an appeal is frivolous, and taken purely for delay, the appellant will be mulcted in damages. *Muller v. Rowell*, 110 Cal. 318.

<sup>386</sup> *Adams v. Law*, 16 How. (U. S.) 144.

<sup>387</sup> *Hudgins v. Komp*, 18 How. (U. S.) 530; *Anson v. Blue Ridge R. R. Co.*, 23 id. 1.

<sup>388</sup> *Cleveland v. Chamberlain*, 1 Black, 419.

<sup>389</sup> *Foscalina v. Doyle*, 48 Cal. 151.

<sup>390</sup> *Bornhelmer v. Baldwin*, 38 Cal. 671.

<sup>391</sup> *Harlan v. Pratt*, 50 Cal. 94.

<sup>392</sup> *Bienenfeld v. Milling Co.*, 82 Cal. 425; *State v. Kemp*, 5 Wash. St. 212; *Names v. Names*, 74 Iowa, 213.

<sup>393</sup> *People v. Burns*, 78 Cal. 645; *Estate of Baby*, 87 id. 200; *Nunan v. Valentine*, 83 id. 588.

that the appeal was taken or is being prosecuted without authority, and against the desire or wish, of the appellant;<sup>394</sup> so where no sufficient undertaking is filed;<sup>395</sup> or where an undertaking is filed before the notice of appeal is served.<sup>396</sup> But an appeal will not be dismissed on account of a defective bond, until the defect has been adjudged and an opportunity given the appellant to amend.<sup>397</sup> An appeal may be dismissed for noncompliance with the rules of court as to the mode of its presentation.<sup>398</sup> Failure to serve notice of the appeal is ground for dismissal;<sup>399</sup> so if the notice of appeal was served and filed prior to the entry of the judgment;<sup>400</sup> but failure to serve notice of appeal upon a defendant who does not appear in the action is not ground for dismissal.<sup>401</sup> Dismissal of appeal for failure to serve and file transcript;<sup>402</sup> abstract of record;<sup>403</sup> or briefs, in accordance with rules of court;<sup>404</sup> or where the transcript is defective.<sup>405</sup> But the fact that the appellant's

<sup>394</sup> Dalbckermeyer v. Scholtes, 3 S. Dak. 124.

<sup>395</sup> Cronin v. Mining Co., 2 Idaho, 1146; *In re Danielson*, 88 Cal. 480; Pacific Paving Co. v. Bolton, 89 id. 154; Perkins v. Cooper, 87 id. 241; Fogel v. Schmalz, 83 id. 201; Berniaud v. Beecher, 74 id. 617; McCormick v. Belvin, 96 id. 182; State v. Fisher, 4 Wash. St. 382; Fisher v. Fisher, 9 id. 694; see Moyle v. Landers, 78 Cal. 99.

<sup>396</sup> Hawthorne v. East Portland, 12 Oreg. 210; *contra*, Runyan v. Russell, 3 Wash. St. 665.

<sup>397</sup> Miller v. Vermurle, 7 Wash. St. 386; Pierce v. Miles, 5 Mont. 549; see Swasey v. Adair, 83 Cal. 136; § 5079, *ante*.

<sup>398</sup> Henry v. Insurance Co., 16 Col. 179; Alder, etc., Min. Co. v. Hayes, 6 Mont. 31; Shain v. People's Lumber Co., 98 Cal. 120.

<sup>399</sup> First Nat. Bank v. McLean, 6 Wash. St. 296; Johnson v. Lighthouse, 8 id. 32; Webber v. Brieger, 1 Col. App. 92.

<sup>400</sup> People v. Center, 66 Cal. 551; Tyrrell v. Baldwin, 72 id. 192; Dwyer v. Schlumpf, 6 Wash. St. 25.

<sup>401</sup> Essency v. Essency, 10 Wash. St. 375; see Traders' Bank v. Boklen, 5 id. 777; Brown v. Rouse, 93 Cal. 237; Jackson v. Brown, 82 id. 275.

<sup>402</sup> See § 5079, *ante*; Raymond v. McMullen, 90 Cal. 122; White v. White, 112 id. 577; Rumfelt v. Canal, etc., Co., 83 id. 649; Westhelmer v. Thompson, 2 Idaho, 1137.

<sup>403</sup> Buckey v. Phenicle, 4 Col. App. 204; Hammond v. Herdman, 3 id. 379.

<sup>404</sup> Emerick v. Ogden City, 9 Utah, 372; Howlett v. Tuttle, 10 Col. 222; Lyen v. Bond, 3 Wash. Ter. 407; McDonald v. McLeod, 3 Col. App. 344.

<sup>405</sup> Owsley v. Warfield, 7 Mont. 102; Lewis v. Host, 2 Wash. Ter. 402; Wheeler v. Lager, 3 Wash. St. 732; *In re Siering*, 90 Cal. 207; Adams v. McPherson, 2 Idaho, 855; Rotch v. Hamilton, 7 Utah, 513; Brick Co. v. Dubois, 10 id. 30; State v. Lamb, 20 Nev. 181.

brief does not designate all of the defendants as respondents is not ground for dismissing the appeal, if the notice of appeal was properly entitled and was served upon all the parties appearing in the action.<sup>406</sup> An appeal may be dismissed on admission of the appellant that the demurrer was properly sustained;<sup>407</sup> or for neglect of the appellant;<sup>408</sup> or because the appellant was not a party aggrieved;<sup>409</sup> and if there is no question involved in an appeal which is not controlled by the statement of facts, the striking of the statement from the record will work a dismissal of the appeal.<sup>410</sup> An appeal by and in the name of an administrator, taken after he has been fully discharged as such administrator and a new administrator has been appointed and qualified, gives the appellate court no jurisdiction over the estate, or of a cause of action against the estate, and will be dismissed.<sup>411</sup>

§ 5079b. **The same — dismissal denied.** An appeal will not be dismissed for failure by appellant to serve appellee with copies of the record, as required by rule of court, unless the appellee takes advantage of such failure in the manner and at the time prescribed in the rule.<sup>412</sup> Nor will an appeal be dismissed for failure of appellants to except to findings or to ask for further findings, nor, under Montana practice, for failure to file briefs within the time required by the rules of court.<sup>413</sup> And although no transcript has been filed, or has not been filed within the time prescribed, yet if a good and satisfactory

<sup>406</sup> Warburton v. Ralph, 9 Wash. St. 537. Dismissal of appeal by reason of defective transcript. See, also, Richardson v. Eureka, 92 Cal. 64; Howell v. Howell, 101 id. 115; Green v. McMann, 79 id. 561; Beets v. Chart, id. 185; Woodside v. Hewel, 107 id. 141; omission of part of judgment-roll from transcript. Paige v. Roeding, 89 Cal. 69; absence of exceptions. Randall v. Duff, 105 Cal. 271; want of certificate to transcript. *In re Wierbitsky*, 88 Cal. 333; interlineations and erasures in transcript. Fogel v. Schmalz, 83 Cal. 201; Rotch v. Hamilton, 7 Utah, 513.

<sup>407</sup> Shute v. Smith, 7 Wash. St. 194.

<sup>408</sup> Bethell v. Rogers, 100 Cal. 175.

<sup>409</sup> Rankin v. Railroad Co., 73 Cal. 96; Goldtree v. Thompson, 83 id. 420.

<sup>410</sup> McQuillan v. Seattle, 7 Wash. St. 331; Watt v. O'Brien, 6 id. 415; Gordon v. Nelson, 4 id. 817.

<sup>411</sup> McCermick, etc., Mach. Co. v. Snedigar, 3 S. Dak. 302.

<sup>412</sup> Mora v. Schick, 4 N. Mex. 158.

<sup>413</sup> Logan v. Rickards, 14 Mont. 334.

excuse is shown for the failure, the appeal will not be dismissed.<sup>414</sup> An appeal will not be dismissed because taken before the costs and disbursements in the court below are taxed and inserted in the entry of the judgment appealed from.<sup>415</sup> Under Utah procedure, an appeal from the judgment will not be dismissed, because an appeal from the order denying a new trial in the same case is before the court.<sup>416</sup> When an appeal has been legally taken from an order of the Superior Court, the lack of a bill of exceptions embodying and authenticating its proceedings is not a ground for dismissing the appeal.<sup>417</sup> An appeal from a judgment entered in the court below under the direction of the appellate court, upon a former appeal, can not be dismissed upon the ground that such judgment is not appealable.<sup>418</sup> The fact that papers printed in the transcript are not identified as having been used on the motion on which the order appealed from was made will not justify a dismissal of the appeal.<sup>419</sup> Nor is it ground for dismissal that the statement on motion for a new trial was not served on all the adverse parties, when the parties not served are not interested in the appeal.<sup>420</sup> And motion to dismiss an appeal because no notice of motion for a new trial appeared in the record, was denied.<sup>421</sup> When the appellant is an executor, a motion to dismiss the appeal because of the failure to file an undertaking on the appeal, will be denied.<sup>422</sup> A second motion to dismiss an appeal made for a cause existing when the first motion to dismiss was made, will not be entertained.<sup>423</sup>

<sup>414</sup> See *Pouplon v. Muzis*, 68 Cal. 235 *In re Burton*, 93 id. 613; *Hubback v. Ross*, 79 id. 564; *McGrath v. Hyde*, 71 id. 454; *Grant v. De Lamori*, id. 329; *Dorn v. Baker*, 92 id. 194; *Mill Co. v. Johnston*, 5 Utah, 147; *Gustin v. Jose*, 10 Wash. St. 217; *Benn v. Chehalis County*, 10 id. 294; *Fox v. Utter*, 6 id. 299; *Barnhart v. Fulkerth*, 92 Cal. 155. Insufficient excuse. See *Shepherd v. Shepherd*, 4 Wash. St. 615; *County of Chehalis v. Pearson*, 10 id. 216; *Murphy v. Ross*, 2 id. 327.

<sup>415</sup> *Williams v. Wait*, 2 S. Dak. 210; see *Richardson v. Rogers*, 37 Minn. 463.

<sup>416</sup> *Kelly v. Kershaw*, 5 Utah, 300.

<sup>417</sup> *Howell v. Howell*, 101 Cal. 115.

<sup>418</sup> *Randall v. Duff*, 107 Cal. 33.

<sup>419</sup> *Herrlich v. McDonald*, 72 Cal. 579.

<sup>420</sup> *Dore v. Dougherty*, 72 Cal. 232.

<sup>421</sup> *Gage v. Downey*, 79 Cal. 140; following *Pico v. Cohn*, 78 id. 384; see § 5079. *ante*.

<sup>422</sup> *Kirsch v. Derby*, 93 Cal. 573.

<sup>423</sup> *Stevens v. Higgenbotham*, 6 Utah, 341.



§ 5080. **Dismissal, effect of.** Dismissal for want of prosecution operates as an affirmance of the judgment, within the statute relative to undertakings on appeal, unless the order of dismissal be vacated during the term;<sup>424</sup> or where the dismissal is on the merits.<sup>425</sup> Where the dismissal has been made upon some technical defect in the notice of appeal, or the undertaking, or the like, it is not a bar.<sup>426</sup> It has been held that after the dismissal of an appeal the appellate court loses all jurisdiction in the case. It stands in the same situation it did before the appeal was prayed.<sup>427</sup> The dismissal of an appeal from a judgment because of a failure to file the transcript within the time prescribed is, in effect, an affirmance of the judgment, if the order of dismissal does not expressly provide that it is made without prejudice to the right of the appellant to take another appeal, and a second appeal from the same judgment will be dismissed.<sup>428</sup> As a general rule, the dismissal of an appeal is practically an affirmance of the judgment appealed from.<sup>429</sup> But there are exceptions to this rule.<sup>430</sup> Dismissal of an appeal because it was prematurely taken is not a bar to a second appeal in the same case when a record is made up from which an appeal can be taken.<sup>431</sup> An order dismissing an appeal may be modified, so as to read "without prejudice," thus permitting the prosecution of a second appeal, notwithstanding the *remittitur* has issued before the modification is made.<sup>432</sup> An appeal from a judgment and from an order overruling a motion for a new trial, made after judgment, on the ground

<sup>424</sup> *Karth v. Light*, 15 Cal. 324; *Rowland v. Kreyenhagen*, 24 id. 52; *Chamberlin v. Reed*, 16 id. 207.

<sup>425</sup> *Karth v. Light*, 15 Cal. 324.

<sup>426</sup> *Id.*

<sup>427</sup> *Maxwell v. Williams*, Hempst. 172; see Cal. Code Civ. Pro., § 955.

<sup>428</sup> *Garibaldi v. Garr*, 97 Cal. 253; *Spinetti v. Brignardello*, 54 id. 521.

<sup>429</sup> *Shannon v. Dodge*, 18 Col. 164; *State v. Blesman*, 12 Mont. 12; *Simpson v. Prather*, 5 Oreg. 88; *Beecher v. Lewis*, 84 Va. 630; *Manler v. Lindsey*, 3 Bush, 94.

<sup>430</sup> See *State v. McKinnon*, 8 Oreg. 485; *Freas v. Engelbrecht*, 3 Col. 377, 383.

<sup>431</sup> *Estate of Rose*, 80 Cal. 166.

<sup>432</sup> *Romine v. Oralle*, 80 Cal. 626. Under Colorado practice, when an appeal is dismissed "without prejudice," the appellant's right to a writ of error at any time within three years from the rendition of judgment remains. *McMichael v. Groves*, 14 Col. 540.



of insufficiency of the evidence to sustain the verdict, will not be dismissed as a double appeal.<sup>433</sup> Under Washington Appeal Act of 1893, an appellant has a right to dismiss his appeal with a view to a second appeal, but such dismissal will not be granted him without prejudice, and the Supreme Court will retain jurisdiction for the purpose of affirming the judgment in the respondent's favor, in case the appellant fails to prosecute a second appeal within the time limited by law.<sup>434</sup>

§ 5080a. **Dismissal — procedure.** A motion to dismiss an appeal is not a general appearance.<sup>435</sup> The motion must be presented at the earliest reasonable opportunity;<sup>436</sup> and the grounds relied upon for dismissal should be specifically pointed out in the motion.<sup>437</sup> Notice of the motion must be given to the adverse party.<sup>438</sup> The motion can not be made by one who was not a party to the appellate proceedings.<sup>439</sup> And where a respondent dies pending an appeal, a motion by his personal representatives for its dismissal will not be entertained until they have been substituted in the appellate court in his place. A substitution in the lower court is not sufficient.<sup>440</sup> A stipulation made in the appellate court may be considered on a motion to dismiss the appeal, although not embodied in the transcript.<sup>441</sup> When a motion to dismiss an appeal has been denied, a renewal of the motion upon the same grounds, upon the

<sup>433</sup> *Hawkins v. Hubbard*, 2 S. Dak. 631; distinguishing *Hackett v. Gunderson*, 1 id. 479; see § 5079, *ante*; *Winter v. McMillan*, 87 Cal. 256; *Morris v. Niles*, 67 Wis. 341.

<sup>434</sup> *Agassiz v. Kelleher*, 9 Wash. St. 656; see *Tinkham v. Kimble*, 2 id. 682.

<sup>435</sup> *Law v. Nelson*, 14 Col. 409; *Oallahan v. Jennings*, 16 id. 471.

<sup>436</sup> *Coby v. Halthusen*, 16 Col. 10; *Lamet v. Miller*, 68 Cal. 521; *Anderson v. Webster*, 30 Fla. 220.

<sup>437</sup> *Billyen v. Smith*, 18 Oreg. 35; *Dyer v. Bradley*, 88 Cal. 590.

<sup>438</sup> *Dick v. Mullins*, 128 Ind. 365; *Louchelne v. Strouse*, 46 Wis. 487.

<sup>439</sup> *Blanc v. Rodgers*, 47 Cal. 606. But when the motion to dismiss goes to the want of jurisdiction to entertain the appeal, it is not material that the motion is made by persons not parties to the record. In such case the court may dismiss of its own motion. *Bullock v. Taylor*, 112 Cal. 147; see *In re Castle Dome Mining, etc., Co.*, 79 id. 246.

<sup>440</sup> *Lyons v. Roach*, 72 Cal. 85.

<sup>441</sup> *People v. Burns*, 78 Cal. 645. Identification of papers not in transcript on hearing of motion to dismiss appeal. See *Schammel v. Schammel*, 70 Cal. 72.

hearing of the appeal upon its merits, without leave granted in the former order, has nothing to commend it to the discretion of the court, and such renewed motion will also be denied.<sup>442</sup>

**§ 5081. Reinstatement.** When an appeal has been dismissed, the appellate court may, upon good cause shown, reinstate it upon motion.<sup>443</sup> But if dismissed for want of jurisdiction as to amount in controversy, affidavits of its value come too late.<sup>444</sup> If from any excusable cause appellant has been prevented from prosecuting his appeal, and the same has been dismissed, his remedy is by motion to reinstate the case. And if from like cause he has been prevented from making his motion at the same term in which his appeal was dismissed, he may, upon proper showing, and after due notice to the respondent, make the motion at a subsequent term.<sup>445</sup> Such motion must be supported by affidavit that, in the opinion of counsel, there are substantial errors in the record.<sup>446</sup> A case will be reinstated where fraud or imposition has been used in procuring its dismissal.<sup>447</sup>

**§ 5082. What will be reviewed.** In general, all material errors committed by the court below in its orders, rulings, decisions, and judgments will be reviewed in the Supreme Court on appeal, when the same are properly made to appear by the record.

**§ 5083. Errors in judgment-roll.** The Supreme Court will take notice of errors appearing in the judgment-roll, even if

<sup>442</sup> *Tyrrell v. Baldwin*, 78 Cal. 470.

<sup>443</sup> *The Palmyra*, 12 Wheat. 9; *Bank of U. S. v. Swan*, 3 Pet. 68. When motion to reinstate appeal will be denied. See *Swope v. Smith*, 1 Okl. 283; *State v. Gibbs*, 10 Mont. 212; *Clark-Harris Co. v. Douthitt*, 5 Wash. St. 96; *Evans v. Kilby*, 81 Ga. 278; *Harmon v. Lexington*, 32 S. C. 583. The rule of practice is for counsel in his place in open court to state his grounds for reinstatement, or to make an affidavit of the truth of the grounds. *Taylor v. State*, 82 Ga. 578.

<sup>444</sup> *Richmond v. City of Milwaukie*, 21 How. (U. S.) 391.

<sup>445</sup> *Haight v. Gay*, 8 Cal. 300.

<sup>446</sup> *Hagar v. Mead*, 25 Cal. 598; *Dorland v. McGlynn*, 45 id. 18; see, also, *Welch v. Kenney*, 47 id. 414, and rules 3 and 4 of Cal. Supreme Court.

<sup>447</sup> *Rowland v. Kreyenhagen*, 24 Cal. 52; *Howell v. Van Ness*, 81 N. J. L. 444.

not named in the specification of errors in the statement;<sup>448</sup> but not minor errors, if on the whole record the decree be right.<sup>449</sup> On an appeal from the judgment, where there is no statement, the appellate court will only consider matters appearing in the judgment-roll.<sup>450</sup>

§ 5084. **Errors in law.** Errors in law will be reviewed in the appellate court, although a new trial was not asked.<sup>451</sup> If no errors are assigned in the record, the appellate court will only review the judgment-roll.<sup>452</sup> They may be reviewed on a bill of exceptions.<sup>453</sup> It has been held that the entire absence of a written decision of the judge trying an issue of fact without a jury may be an error reviewable on appeal.<sup>454</sup> But if the appellant relies on the point that the court below erred in failing to find the facts, he must make it appear by the record, by bill of exceptions, or some other appropriate method, that findings of fact were not waived; otherwise the intendments will support the judgment.<sup>455</sup> The failure of the judge to specify in his decision the relief granted or the determination of the action is an error reviewable on appeal from the judgment.<sup>456</sup> When a motion is granted in the court below, entirely upon alleged errors of law, the Supreme Court will review the action of the court below as in other cases.<sup>457</sup>

§ 5085. **Errors in the rulings.** The errors in the rulings of the court in the progress of the trial are subject to review, when the exceptions are preserved by bill of exceptions, or

<sup>448</sup> *Sharp v. Daugney*, 33 Cal. 505.

<sup>449</sup> *Goode v. Smith*, 13 Cal. 81.

<sup>450</sup> *Harper v. Minor*, 27 Cal. 107; *O'Donnell v. Glenn*, 8 Mont. 248; *Chase v. Evoy*, 58 Cal. 348; see § 5047, *ante*.

<sup>451</sup> *Brown v. Tolles*, 7 Cal. 399; *Sanford v. Elevator Co.*, 2 N. Dak. 6.

<sup>452</sup> *Millard v. Hathaway et al.*, 27 Cal. 119, 137. Upon an appeal from an order denying a new trial, errors apparent on the face of the judgment-roll can not be considered. *Estate of Westerfield*, 98 Cal. 113; *Simpson v. Ogg*, 18 Nev. 28; and see § 5047, *ante*.

<sup>453</sup> *McCartney v. Filtz Henry*, 16 Cal. 184; *Collier v. Corbett*, 15 id. 183; *Walls v. Preston*, 25 id. 59.

<sup>454</sup> *Russel v. Armador*, 2 Cal. 305; *Ragan v. McCoy*, 26 Mo. 166; *Sutter v. Streit*, 21 id. 157.

<sup>455</sup> *Mulcahy v. Glazler*, 51 Cal. 626.

<sup>456</sup> *Chamberlain v. Dempsey*, 14 Abb. Pr. 241.

<sup>457</sup> *O'Brien v. Brady*, 23 Cal. 243.

brought up in a statement on appeal.<sup>458</sup> Where the questions in a case arise upon motion for nonsuit, and upon the action of the court in giving and refusing instructions, a motion for new trial is unnecessary.<sup>459</sup>

**§ 5086. Evidence and facts.** The Supreme Court will look at the evidence so far only as to see the relevancy of the exceptions taken during the trial.<sup>460</sup> On appeal from an order granting or refusing a new trial, the Supreme Court always reviews the evidence, if the point is made that the verdict is contrary to the evidence.<sup>461</sup> But in an equity case submitted by the court to a jury, the appellate court will not review the testimony, if any proof sustains the verdict and judgment.<sup>462</sup> The court will review the facts of a case only to see if there is a substantial conflict of evidence.<sup>463</sup> If, however, the evidence against the verdict is so overwhelming as to justify the inference that it was rendered under the influence of passion or prejudice, or bias of some kind, a new trial should be granted, even though there is some conflict.<sup>464</sup> But on appeal from orders determining the action and preventing a final judgment, questions of fact are reviewable.<sup>465</sup> But the Supreme Court can not examine the evidence for the purpose of finding a fact.<sup>465a</sup>

<sup>458</sup> *Carpentier v. Williamson*, 25 Cal. 154; *Wallace v. Maples*, 79 id. 433. A party can not complain on appeal of a ruling which he obtained in the lower court upon his own motion. *Ervin v. Milne*, 17 Mont. 494; *Reed v. Poindexter*, 16 id. 294.

<sup>459</sup> *Sullivan v. Cary*, 17 Cal. 80; *Darst v. Rush*, 14 id. 81.

<sup>460</sup> *Carpentier v. Williamson*, 25 Cal. 154.

<sup>461</sup> *Rice v. Cunningham*, 29 Cal. 492.

<sup>462</sup> *Pfeiffer v. Riehn*, 13 Cal. 643.

<sup>463</sup> *Rice v. Cunningham*, 29 Cal. 492; *Orook v. Forsyth*, 30 id. 662; *Wilkinson v. Parrott*, 32 id. 102; *Hardenbergh v. Bacon*, 33 id. 356; *Hall v. Bark Emily Banning*, id. 522; *Wendt v. Ross*, id. 650; consult also *White v. Lyons*, 42 id. 283; *Hellman v. Howard*, 44 id. 104; *Orosett v. Wheelan*, id. 203; *Higuera v. Bernal*, 46 id. 581; *Thompson v. Toland*, 48 id. 114; *Sperry v. Spaulding*, 49 id. 253; *Noonan v. Hood*, id. 294; *Trenor v. O. P. R. R. Co.*, 50 id. 222; *Jones v. Shay*, id. 509; § 5116, *post*.

<sup>464</sup> *Cooper v. Pena*, 21 Cal. 403; *Dickey v. Davis*, 39 id. 569; *Mason v. Austin*, 46 id. 641; *Sherman v. Mitchell*, id. 579; and see § 4920, *ante*.

<sup>465</sup> *Bates v. Voorhies*, 20 N. Y. 525.

<sup>465a</sup> *Ellis v. Jeans*, 26 Cal. 278; *Carpentier v. Gardiner*, 29 id. 160.

§ 5086a. **The same — continued.** The appellate court will not consider a ruling upon an objection to evidence in the absence of the evidence.<sup>466</sup> Alleged error in the admission of evidence will not be reviewed on appeal, unless the record shows that the evidence was objected to, and an exception reserved at the trial, notwithstanding the statement on motion for a new trial specifies the admission of the evidence as one of the errors on which the party moving would rely.<sup>467</sup> On an appeal from the judgment, there can be no review of the evidence where the bill of exceptions contains no specifications of the insufficiency of the evidence to justify the findings.<sup>468</sup> A bill of exceptions or statement being the statutory record for reviewing evidence, if the parties wish to waive such record, and substitute a stipulation for it, the intention to do so must appear with reasonable certainty.<sup>469</sup> Specifications of the insufficiency of the evidence which are merely brief statements of what the evidence shows are insufficient.<sup>470</sup> If an appeal is taken from the judgment alone, more than sixty days after its rendition, no question as to the sufficiency of the evidence can be considered.<sup>471</sup> Evidence volunteered in the court below, without objection, can not be objected to on appeal.<sup>472</sup> If there is sufficient evidence in the record to warrant the verdict, without that which was admitted over objection, the appellate court is not required to determine whether error intervened in overruling the objec-

<sup>466</sup> *People v. Olsen*, 80 Cal. 122; and see *Hoagland v. Cole*, 18 Col. 426; *York v. Fortenbury*, 15 id. 129.

<sup>467</sup> *Macadamizing Co. v. Williams*, 70 Cal. 534; see, also, *Dean v. Parker*, 88 id. 283; *Pasadena v. Stimson*, 91 id. 238; *Winterburn v. Chambers*, 91 id. 170; *Malone v. County of Del Norte*, 77 id. 217; *Ullman v. McCormic*, 12 Col. 553; *Curr v. Hundley*, 3 Col. App. 54; *Blackwell v. McLean*, 9 Wash. St. 301; *White Pine Co. v. Herrick*, 19 Nev. 311; *McCarty v. Hayden*, 4 Wash. St. 537; *Hattersley v. Burrows*, 4 Col. App. 538; *Tucker v. Jones*, 8 Mont. 225; *Territory v. Keyes*, 5 Dak. 244; *Bowman v. Eppinger*, 1 N. Dak. 21; *Territory v. Bell*, 5 Mont. 562; *Rutherford v. Talent*, 6 id. 132; *Bass v. Baker*, id. 442; § 4902, *ante*.

<sup>468</sup> *Fatjo v. Swasey*, 111 Cal. 628; *Gallatin Canal Co. v. Lay*, 10 Mont. 528; *Carron v. Wood*, id. 500; *Beaty v. Mining Co.*, 15 id. 314.

<sup>469</sup> *Siebe v. Machine Works*, 86 Cal. 390; and see *Howard v. Ross*, 3 Wash. St. 292.

<sup>470</sup> *Adams v. Helbing*, 107 Cal. 298.

<sup>471</sup> *Greenwood v. Adams*, 80 Cal. 74; *Secord v. Quigley*, 106 id. 149; Cal. Code Civ. Pro., § 939, subd. 1.

<sup>472</sup> *Reuton v. Monnier*, 77 Cal. 449; and see *Zook v. Odle*, 3 Col. App. 87.

tion.<sup>473</sup> It is a well-settled general rule, that where the evidence upon a question of fact is conflicting, a finding of the trial court thereon will not be disturbed upon appeal.<sup>474</sup> And this is so although the evidence consists of depositions.<sup>475</sup> But the appellate court will look more closely into the evidence when it consists entirely of depositions, affidavits, or notes of former testimony;<sup>476</sup> and it was held that the general rule above stated does not apply where the evidence is all documentary.<sup>477</sup> An objection to the admission of a deposition, on the ground that the deponent appears to reside within the jurisdiction of the court, is not available on appeal where the deposition is not made part of the record.<sup>478</sup> The judgment of the lower court will not be disturbed upon a mere preponderance of the testimony.<sup>479</sup> It is not the business of an appellate court to judge of the *quantum* of proof, or pass upon the weight of evidence.<sup>480</sup> It will not, in a law case, usurp the functions of a jury, or of a judge acting in the capacity of a jury, and reverse the judgment because the weight of testimony seems to be on the other side, or because, in a case of conflict of evidence, the jury believed the testimony of witnesses that the appellate court does

<sup>473</sup> *Monat v. Wood*, 4 Col. App. 118.

<sup>474</sup> *Priest v. Brown*, 100 Cal. 626; § 4902, *ante*; and see, in illustration of the rule, the following decisions: *Soberanes v. Soberanes*, 106 Cal. 1; *Loftus v. Fisher*, 113 id. 286; *Mahan v. Wood*, 105 id. 12; *In re Sylvester*, id. 189; *White v. Beer*, id. 9; *Turner v. Luning*, id. 124; *Meyer v. Insurance Co.*, 104 id. 381; *Knox v. Moses*, id. 502; *Dobinson v. McDonald*, 92 id. 33; *Long v. Sanfly*, 89 id. 437; *Chadbourne v. Davis*, 9 Col. 581; *Miller v. Mickel*, id. 331; *Riley v. Riley*, 14 id. 290; *Hallack v. Stockdale*, id. 198; *Doherty v. Morris*, 17 id. 105; *Potts v. Magnes*, id. 364; *Castner v. Richardson*, 18 id. 496; *Corkins v. Prichard*, 3 N. Mex. 184; *Hardwick v. Insurance Co.*, 23 Oreg. 290; *Fischer v. Quigley*, 8 Wash. St. 327; *West Coast Imp. Co. v. Winsor*, id. 490; *State v. Manville*, id. 523; *Seattle Gas, etc., Co. v. Seattle*, 6 id. 101; *Ketchum v. Davis*, 3 Wyo. 164; *Chamberlain v. Woodin*, 2 Idaho, 609; *O'Connor v. Langdon*, id. 803; *Farr v. Griffith*, 9 Utah, 416; *Smyth v. Lawson*, 7 id. 412; *Brewing Co. v. Elevator Co.*, 5 Dak. 62; *Bronenfield v. Bier*, 15 Mont. 403.

<sup>475</sup> *Priest v. Brown*, 100 Cal. 626.

<sup>476</sup> *Reay v. Butler*, 95 Cal. 206.

<sup>477</sup> *Tuller v. Arnold*, 93 Cal. 166.

<sup>478</sup> *Ullman v. McCormic*, 12 Col. 553.

<sup>479</sup> *Dougan v. Abbott*, 7 Wash. St. 370.

<sup>480</sup> *McBee v. Ceasar*, 15 Oreg. 62; *Booth v. Railroad Co.*, 6 Wash. St. 531; *Boburg v. Prahl*, 3 Wyo. 325; *United States v. Trabing*, id. 144.

not believe.<sup>481</sup> Where there is substantial conflict in the testimony as to disputed facts, the appellate court is authorized to assume as proved the facts found, which there is substantial evidence to uphold.<sup>482</sup> The insufficiency of the evidence to justify the findings implied in a judgment where findings are waived can not be considered upon appeal from the judgment, in the absence of a statement on motion for a new trial, or bill of exceptions containing a statement of the evidence or want of evidence.<sup>483</sup>

§ 5087. **From final judgment.** On an appeal from a final judgment, the Supreme Court may review such intermediate nonappealable orders as involve the merits.<sup>484</sup> It may review an order overruling an exception to the report of a referee, taken on the alleged ground that the report did not find the facts as required by the order of reference.<sup>485</sup> But an order denying a new trial can not be reviewed on an appeal from a final judgment.<sup>486</sup> If on the rendition of a final judgment the court also grants a perpetual injunction, and an appeal is taken from the whole judgment, the injunction is included in the appeal.<sup>487</sup> An order adding a new party plaintiff may be reviewed on appeal from the judgment;<sup>488</sup> or an order for judgment on demurrer.<sup>489</sup> An order dismissing an attachment if the appeal is also taken from such order.<sup>490</sup>

§ 5088. **Orders.** An enumeration of appealable orders are given in the Code.<sup>491</sup> All other orders can be reviewed only on appeal from the judgment, and then only when there has been an exception properly made and preserved in the record. An

<sup>481</sup> *Graves v. Banking Co.*, 3 Wash. St. 742; *Lybarger v. State*, 2 id. 552; and see *Board of Education v. Martin*, 92 Cal. 209.

<sup>482</sup> *Adams v. Burbank*, 103 Cal. 646.

<sup>483</sup> *Davis v. Lezinsky*, 93 Cal. 126.

<sup>484</sup> Cal. Code Civ. Pro., § 956; *Hihn v. Peck*, 30 Cal. 280. For the review, in such case, there must be a bill of exceptions. *Gilman v. Bootz*, 80 Cal. 564.

<sup>485</sup> Cal. Code Civ. Pro., § 956.

<sup>486</sup> Id.; see § 5065, *ante*.

<sup>487</sup> *McGarrahan v. Maxwell*, 28 Cal. 75.

<sup>488</sup> *Davis v. Mayor of New York*, 14 N. Y. 526.

<sup>489</sup> *Hollister Bank of Buffalo v. Vail*, 15 N. Y. 593; *Paddock v. Springfield Fire & Marine Ins. Co.*, 12 N. Y. 591; *Ford v. Davis*, 3 Abb. Pr. 385; see § 4956, *ante*.

<sup>490</sup> *Williams v. Glasgow*, 1 Nev. 533.

<sup>491</sup> See Cal. Code Civ. Pro., § 939, subd. 3; see, also, § 4985a, *ante*.



appeal may, however, be taken at the same time from a final judgment and from an appealable order, but each must distinctly appear in the notice of appeal and the undertaking.

§ 5089. **Practice.** A party who appears and contests a motion can not on appeal object that he had no notice of motion.<sup>492</sup> The objection that the statement and notice do not specify the grounds of motion for new trial should be taken in the court below, and if overruled will be reviewed in the Supreme Court.<sup>493</sup> Where a party moves for a nonsuit upon a specific ground, he can not on appeal assume a different position;<sup>494</sup> or that the court below refused a nonsuit, because of no demand made before suit unless that ground was taken below;<sup>495</sup> or an objection to an order overruling a motion to set aside the judgment and quash the execution.<sup>496</sup> The failure of a party to object to the rendition of a judgment upon a report is no waiver of his right to have his exceptions to the report reviewed.<sup>497</sup> No objection or exception will be examined, except such as are included in the appellant's statement of points on which he relies.<sup>498</sup>

§ 5090. **Statute of Limitations.** The question of the Statute of Limitations can not be raised, even though pleaded, unless raised in some form on the trial below.<sup>499</sup>

§ 5091. **What will not be reviewed.** The appellate court can not review any portions of an adjudication not actually appealed from,<sup>500</sup> nor which is not included in the printed case.<sup>501</sup> Nothing can be taken into consideration that does not appear upon the return.<sup>502</sup> As a general rule, an objection which might

<sup>492</sup> Reynolds v. Harris, 14 Cal. 667; 76 Am. Dec. 459.

<sup>493</sup> Brady v. O'Brien, 23 Cal. 244.

<sup>494</sup> Mateer v. Brown, 1 Cal. 221; 52 Am. Dec. 303.

<sup>495</sup> Baker v. Joseph, 16 Cal. 173.

<sup>496</sup> Smith v. Curtis, 7 Cal. 584.

<sup>497</sup> Headley v. Reed, 2 Cal. 322.

<sup>498</sup> Moore v. Murdock, 26 Cal. 514.

<sup>499</sup> McDonald v. Bear River Co., 13 Cal. 238; Shaver v. Sharp County, 62 Ark. 76.

<sup>500</sup> Robertson v. Bullions, 11 N. Y. 243; Kelsey v. Western, 2 Id. 500; Bell v. Holford, 1 Duer, 58.

<sup>501</sup> Titus v. Orvis, 16 N. Y. 617; Otis v. Spencer, Id. 810.

<sup>502</sup> Spence v. Beck, 1 Hilt. 276; Kilpatrick v. Carr, 3 Abb. Pr. 117; Ranson v. Grow, 4 E. D. Smith, 18; Trust v. Delaplaine, 3 Id. 219; Prentice v. Zane, 8 How. (U. S.) 470; see § 5104, *post*.



have been obviated in the court below will not be reviewed on appeal.<sup>503</sup>

§ 5092. **Costs.** An error of court in refusing to allow costs can not be reviewed on an appeal from an order denying a new trial.<sup>504</sup> On appeal from a judgment, an error which might occur in sustaining a motion, after the appeal was perfected, to strike out the cost-bill, can not be reviewed.<sup>505</sup>

§ 5093. **Evidence.** As a rule, the Supreme Court acts upon the case precisely as it was presented to the court below, and can not receive or notice new evidence. In New York, it is said to be a well-established rule that permits record evidence, imperfectly proved on the trial, to be exhibited on the argument in the appellate court, since if all that was defective was then supplied, it would be idle to send the cause back for a new trial upon an exception no longer tenable.<sup>506</sup> But the Supreme Court will not review the facts of the case unless a new trial was asked for in the court below, and this whether the case be in equity or at law.<sup>507</sup> If the case, however, be tried on an agreed

<sup>503</sup> Gordon v. Clark, 22 Cal. 533; Bethel v. Robinson, 4 Wash. St. 446; Stewart v. Smith, 14 Abb. Pr. 75; Fowler v. Clearwater, 35 Barb. 143; Judd v. O'Brien, 21 N. Y. 186; Jobbitt v. Goundry, 29 Barb. 509; N. Y. Cent. Ins. Co. v. National Prot. Ins. Co., 14 N. Y. 85; Barnes v. Perine, 12 id. 18; Van Deusen v. Young, 29 Barb. 9; Bumstead v. Dividend Ins. Co., 12 N. Y. 81; Carter v. Hunt, 40 Barb. 89, 93; Forward v. Harris, 30 id. 338; Hunt v. Hoboken Land Co., 1 Hilt. 161; Fenn v. Timpson, 4 E. D. Smith, 276; Barlow v. Scott, 24 N. Y. 40; Greason v. Keteltas, 17 id. 491; Belknap v. Sealey, 14 id. 143; Sheldon v. Wood, 2 Bosw. 267. So errors in favor of an appellant can not be reviewed. Weissner v. Dennison, 10 N. Y. 68; Glassner v. Wheaton, 2 E. D. Smith, 352; Beach v. Raymond, id. 496; Rooney v. Second Ave. R. R. Co., 18 id. 368; Robbins v. Codman, 4 id. 315; Fake v. Whipple, 39 Barb. 339; Wellman v. Railway Co., 21 Oreg. 530.

<sup>504</sup> Stevenson v. Smith, 28 Cal. 102; 87 Am. Dec. 107; see § 4949, *ante*; Crane v. Forth, 95 Cal. 88; Freshour v. Hihn, 99 id. 443. The allowance of costs in an equity case is matter within the discretion of the court, and without a statement or bill of exceptions that discretion can not be reviewed on appeal. Faulkner v. Hendy, 103 Cal. 15.

<sup>505</sup> Howard v. Richard, 2 Nev. 128.

<sup>506</sup> Jarvis v. Sewall, 40 Barb. 455; citing Burt v. Place, 4 Wend. 591; Ritchie v. Putnam, 13 id. 524; Dresser v. Brooks, 3 Barb. 429.

<sup>507</sup> Reed v. Bernal, 40 Cal. 630, overruling Treadwell v. Davis, 34 id. 601.

statement of facts, which forms part of the judgment-roll, the question may be raised, on an appeal from the judgment, whether the judgment be authorized by the agreed facts.<sup>508</sup> It would seem, however, that under the Code the question whether the evidence is sufficient to sustain the findings, in a case tried by the court, may be made, on appeal from the judgment, where the testimony is presented by bill of exceptions.<sup>509</sup> The safer practice is, however, to move for a new trial, as the point has not been directly adjudicated. Where the motion for a new trial does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the verdict.<sup>510</sup>

**§ 5094. Facts, questions of.** In New York, on an appeal to the General Term of the Supreme Court, or of a Superior City Court from a final judgment rendered in the same court, the facts as well as law may be reviewed where the judgment was rendered upon a trial by the court below without a jury, or by a referee; but when the judgment was rendered upon the verdict of a jury, the appeal is upon questions of law alone.<sup>511</sup> On an appeal from an order granting or refusing a new trial, the facts may be reviewed, except that where specific questions of fact, arising upon the issues, in an action triable by the court, have been tried by a jury, pursuant to an order for that purpose, an appeal can not be taken from the order granting or refusing a new trial upon the merits.<sup>512</sup> But an order of the General Term granting a new trial upon questions of fact, in a case tried by a jury, is not appealable to the Court of Appeals.<sup>513</sup> Where a new trial is granted in an action tried by a jury, and the record shows that questions of fact were properly before the general term for decision, and that the order for a new trial may

<sup>508</sup> *Reed v. Bernal*, 40 Cal. 630. As to the necessity of a motion for a new trial, see, also, *Foot v. Richmond*, 42 Cal. 439; *Rycraft v. Rycraft*, id. 444; *Stockton v. Creaner*, 45 id. 247; *Evenson v. Webster*, 3 S. Dak. 382; *Pierce v. Manning*, 2 id. 517; *Kleinschmidt v. Iler*, 6 Mont. 122; *Tweel v. Tweel*, id. 19; *Mining Co. v. Haynes*, id. 31; *Colquhoun v. Wells, etc., Co.*, 21 Nev. 459; *State v. Sadler*, id. 13.

<sup>509</sup> See *Jones v. Shay*, 50 Cal. 508; *Thompson v. Hancock*, 51 id. 110; *Bonner v. Quackenbush*, id. 180; *Christie v. Christie*, 53 id. 26.

<sup>510</sup> *Myers v. Casey*, 14 Cal. 542.

<sup>511</sup> N. Y. Code, § 1346.

<sup>512</sup> Id., § 1347.

<sup>513</sup> *Wright v. Hunter*, 46 N. Y. 409; *Downing v. Kelly*, 48 id. 483; *Strong v. B. & A. R. R. Co.*, 58 id. 56.

or could have been based thereon, the court of appeals will not review it for the purpose of reversal.<sup>514</sup> In cases tried by the court or referee, the Court of Appeals will look into the evidence only in exceptional cases, made so by the statute.<sup>515</sup>

§ 5095. **Findings of fact.** Alleged errors in findings of fact will not be considered where the findings themselves are immaterial to the decision;<sup>516</sup> neither the opinions of the court nor the evidence form any part of the findings of fact, although incorporated therein.<sup>517</sup> The findings of the jury on issues submitted to them in an equity case, if not objected to by motion for new trial, or if not set aside by the court on its own motion, become established facts in the case, and can not be questioned in the Supreme Court for the first time.<sup>518</sup> A judgment will not be reversed on the findings alone, unless they show affirmatively that such judgment could not have been properly rendered.<sup>519</sup>

§ 5096. **Findings, omission of.** The omission of a judge or referee trying a cause to find upon a particular question of fact can not be reviewed on an appeal from the judgment. The remedy is to have it referred back for correction.<sup>520</sup> Where the court fails to find the facts which the evidence establishes, a motion for a new trial — that is, to set aside and modify the findings — having been made, the Supreme Court will look into the evidence for such facts, and is not concluded by the findings of the court below.<sup>521</sup> The Supreme Court is not authorized to presume the finding of a fact not within the issue,<sup>522</sup> nor look beyond the findings contained in the case in order to draw inferences of fact bearing on the appeal,<sup>523</sup> except for the purpose of giving a construction to an ambiguous finding.<sup>524</sup>

<sup>514</sup> *Downing v. Kelly*, 48 N. Y. 433; *Wright v. Hunter*, 46 id. 409.

<sup>515</sup> *Feld v. Munson*, 47 N. Y. 221.

<sup>516</sup> *Klockenbaum v. Pierson*, 22 Cal. 160.

<sup>517</sup> *James v. Williams*, 31 Cal. 211; see § 4640, *ante*.

<sup>518</sup> *Duff v. Fisher*, 15 Cal. 375.

<sup>519</sup> *Semple v. Cook*, 50 Cal. 26.

<sup>520</sup> *People v. Albright*, 14 Abb. Pr. 305; *Heroy v. Kerr*, 8 Bosw. 194; *Platt v. Thorne*, id. 574; *Sharp v. Wright*, 35 Barb. 236; *Ingraham v. Gilbert*, 20 id. 151.

<sup>521</sup> *Riley v. Heisch*, 18 Cal. 198.

<sup>522</sup> *Bernal v. Gleim*, 33 Cal. 668; *Gifford v. Carvill*, 29 id. 589.

<sup>523</sup> *Stewart v. Smith*, 14 Abb. Pr. 75.

<sup>524</sup> *Spencer v. Ballou*, 18 N. Y. 327; *Oarman v. Pultz*, 21 id. 547; *Terry v. Wheeler*, 25 id. 520.

§ 5096a. **Findings — review of — generally.** Failure of the trial court to make findings of fact on material issues will not be considered on appeal unless the lower court was asked to make such findings and refused to do so.<sup>525</sup> The appellate court has no power to make findings from the evidence.<sup>526</sup> The fact that there is no finding upon a material issue raised by the pleadings may be considered on appeal, where one of the grounds given in the notice of motion for new trial is, that “the decision is against law.”<sup>527</sup> The insufficiency of the findings to support the judgment can be considered only on an appeal from the judgment.<sup>528</sup> Where written findings are necessary, and do not appear in the record, they will be deemed to have been waived, and if they were not, the error, in order to be reviewed, must be shown by a bill of exceptions, statement, or other appropriate mode whereby the record presents the question.<sup>529</sup> The omission of the trial court to find upon an issue is not an error for which the judgment will be reversed, where it does not appear that evidence was introduced in relation to such issue.<sup>530</sup> So, failure to find fully upon a material issue is not a ground for reversal, if a more complete finding upon the issue would necessarily have been adverse to the appellant.<sup>531</sup> If the complaint sets forth two or more grounds for relief, either of which is sufficient to support a judgment in favor of the plaintiff, a finding upon one of such issues is sufficient to sustain a judgment, and a failure to find upon the other issue does not render the decision against law, and is not ground for a new trial.<sup>532</sup>

<sup>525</sup> *Hicklin v. McClear*, 18 Oreg. 126, 138; *Noland v. Bull*, 24 id. 479; see § 4749, *ante*; and compare *Haight v. Tryon*, 112 Cal. 4.

<sup>526</sup> *Blood v. Water Co.*, 113 Cal. 221.

<sup>527</sup> *Spotts v. Hanley*, 85 Cal. 155; and see *Brison v. Brison*, 90 id. 328; *Adams v. Helbing*, 107 id. 298.

<sup>528</sup> *Kirwan v. Hunnewill*, 93 Cal. 519; and see *Graham v. Stewart*, 68 id. 374.

<sup>529</sup> *Campbell v. Coburn*, 77 Cal. 36; see *Carr v. Cronan*, 54 id. 600. Effect of failure to include findings in the record on appeal. See *State v. Rohde*, 8 Wash. St. 362; *Ortega v. Cordero*, 88 Cal. 221; *Poujade v. Ryan*, 21 Nev. 449.

<sup>530</sup> *Rogers v. Duff*, 97 Cal. 67; *Winslow v. Gohransen*, 88 id. 450.

<sup>531</sup> *Gillespie v. Lake*, 85 Cal. 402; *Sulsman v. Todd*, 96 id. 228.

<sup>532</sup> *Adams v. Helbing*, 107 Cal. 298; *Brison v. Brison*, 90 id. 328; *Malone v. County of Del Norte*, 77 id. 217; *Dolliver v. Dolliver*, 94 id. 642; but see *Estill v. Irvine*, 10 Mont. 509. Defective findings as ground for reversal. See *Otter v. Lindgren*, 106 Cal. 602;

When the findings support the judgment, and contain nothing inconsistent with it, the failure to find upon affirmative defenses will not be ground for reversal, unless it is shown by statement or bill of exceptions that evidence was submitted in relation to the issues presented by such defenses.<sup>533</sup>

Russell v. McDowell, 83 id. 70; Estep v. Armstrong, 91 id. 659; Gould v. Stafford, 77 id. 66; Overacre v. Blake, 82 id. 77; Smith v. Immigration Ass'n, 78 id. 289; Hooker v. Thomas, 86 id. 176; Waldron v. Waldron, 85 id. 251; Bateman v. Raymond, 15 Mont. 439.

<sup>533</sup> Himmelman v. Henry, 84 Cal. 104; Hawes v. Clarke, id. 272; Witcher v. Conklin, id. 499. Under Nevada practice, a case will not be reversed for want of a finding, or for a defective finding, unless the finding is excepted to, or a finding is requested upon the omitted point. Dutertre v. Shallenberger, 21 Nev. 507. There is an implied finding in favor of the judgment, of all facts properly pleaded. Id. Consult, as to when findings will not be disturbed on appeal, Hamar v. Peterson, 9 Wash. St. 152; Park County v. Jefferson County, 12 Col. 585; Ullman v. McCormic, id. 553; Lovejoy v. Chapman, 23 Oreg. 571; Wells v. Wells, 7 Utah, 68; Baker v. Baker, 2 S. Dak. 261; Drown v. Ingels, 3 Wash. St. 424; Reynolds v. Dexter, 2 id. 185; Metropolitan Loan Ass'n v. Esche, 75 Cal. 513; Wood v. Pendola, 78 id. 287; when disregarded on appeal, see Jackson v. Torrence, 83 Cal. 521; conclusiveness of findings in equity cases, see Dooley Block v. Rapid Transit Co., 9 Utah, 31; Canal Co. v. Edwards, 9 id. 477; Cummings v. Ross, 90 Cal. 68; findings in support of order refusing injunction, Hunt v. Steese, 75 Cal. 620; adoption of findings of referee, Stahn v. Hall, 10 Utah, 400; and see Ferry v. Kings County, 2 Wash. St. 337; appeal from finding in replevin, Gramm v. Fisher, 3 Wyo. 585; review of finding of special damages by jury, Wine Co. v. Behlow, 94 Cal. 108; error against party not appealing, McDonald v. Taylor, 89 Cal. 42; review of sufficiency of evidence to sustain finding, Heilbron v. Canal Co., 76 Cal. 11; Parker v. Reay, id. 103; Menk v. Insurance Co., id. 50; Spaulding v. Bradley, 79 id. 449; Pickert v. Rugg, 1 N. Dak. 230; remand to trial court for further testimony, Elliot v. Whitmore, 8 Utah, 253; when findings must stand as approved by the trial court, Meadowcraft v. Walsh, 15 Mont. 544. It is the settled practice of appellate tribunals not to interfere to set aside the finding of a trial court or jury when the questions determined thereby are purely questions of fact, unless the finding is so manifestly unjust as to carry conviction that it was the result of bias or prejudice. Pawnee, etc., Canal Co. v. Jenkins, 1 Col. 425. If there is evidence to sustain the findings of the court, they will be taken as conclusive upon appeal. Glassel v. Verduzo, 108 Cal. 503. And where the evidence is not before the appellate court the findings of fact are conclusive as to the matters therein stated. Loftus v. Fischer, 106 Cal. 616.

§ 5097. **Instructions.** The appellate court will not pass upon the completeness of the instructions given by the court to the jury, if the plaintiff is not entitled to recover upon his own showing.<sup>534</sup> Though the instructions may not be technically correct, the Supreme Court will not interfere if the question upon which the case turns was fairly put before the jury.<sup>535</sup> In determining whether there is error in the instructions to the jury, the whole charge will be considered together, and the judgment will not be reversed, although it may appear that some one instruction taken by itself may not be entirely correct.<sup>536</sup> Error in the giving or refusal of instructions will not be reviewed on appeal where the instructions are not made a part of the judgment-roll, or incorporated in a statement or bill of exceptions.<sup>537</sup> And in order to obtain a review of instructions, it must appear from the record that they were objected to in apt time.<sup>538</sup> And the exceptions should be sufficiently specific to call the attention of the court to the alleged errors.<sup>539</sup> A party can not except to instructions if given at his own instance.<sup>540</sup> And a judgment will not be reversed for an error in the giving or refusing of instructions, if the losing party could not have been prejudiced thereby.<sup>541</sup>

<sup>534</sup> *Enright v. S. F. & S. J. R. R. Co.*, 33 Cal. 230.

<sup>535</sup> *Smith v. Harper*, 5 Cal. 330.

<sup>536</sup> *Wellman v. Railway Co.*, 21 Oreg. 530; and see § 4689, *ante*; *McQuown v. Cavanaugh*, 14 Cal. 188; *White v. Territory*, 1 Wash. St. 279.

<sup>537</sup> *Missoula, etc., Light Co. v. Morgan*, 13 Mont. 394; *Kleinschmidt v. McDermott*, 12 id. 309; and see, as to the sufficiency of the record for the review of instructions, *Rodoni v. Lytle*, 13 Mont. 123; *Malone v. Transportation Co.*, 77 Cal. 39; *Cal., etc., Ry. Co. v. Hooper*, 76 id. 404; *People v. Marseller*, 70 id. 98; *Dawson v. Schloss*, 93 id. 194; *Matthews v. Jones*, 92 id. 563; *Gum v. Murray*, 6 Mont. 10; *Banks v. Hoyt*, 11 Col. 399; *Witcher v. Watkins*, 11 id. 548; *Fisher v. United States*, 1 Okl. 252; *McFeters v. Pierson*, 15 Col. 201; 22 Am. St. Rep. 388; *Hornbein v. Blanchard*, 4 Col. App. 92. Striking instructions from record. See *Medcalf v. Bush*, 4 Wash. St. 386.

<sup>538</sup> *Schoolfield v. Houle*, 13 Col. 394; *Dawson v. Costar*, 18 id. 493; *Garoutte v. Williamson*, 108 Cal. 135.

<sup>539</sup> *Frost v. Creamery Co.*, 102 Cal. 525; *Tapscott v. Lyon*, 103 id. 297; *Bernstein v. Downs*, 112 id. 197; *Meeker v. Gardella*, 1 Wash. St. 139; compare *Cavallaro v. Railway Co.*, 110 Cal. 348; *Nickum v. Gaston*, 24 Oreg. 380.

<sup>540</sup> *Water & Min. Co. v. Baker*, 70 Cal. 572.

<sup>541</sup> *Clark v. Child*, 66 Cal. 87. Presumption in support of instructions. See *Carpenter v. Ewing*, 76 Cal. 487; *Hewlett v. Pilcher*, 85

§ 5098. **Irregularities.** If the decision or verdict is regular, mere irregularities on the trial will not be reviewed;<sup>542</sup> nor the entry of judgment in disregard of an order staying proceedings.<sup>543</sup> But where it had been entered in a grossly irregular manner, and the court below refused to correct it, the error would be reviewed.<sup>544</sup> If a judgment is just in the main, mere technical irregularities of form will be disregarded.<sup>545</sup>

§ 5099. **Matter in discretion of court.** The refusal of a referee to adjourn a hearing, where it was a matter resting in his discretion, will not be reviewed on appeal;<sup>546</sup> nor denial of motion to stay trial till the decision in another cause;<sup>547</sup> or that a judgment for defendant is improper, the answer containing no prayer for relief.<sup>548</sup> The appellate court will not inquire into the reasons which induce the judge to sign the bill after the statutory period.<sup>549</sup> Nothing but an abuse of discretion on his part, or a great preponderance of evidence against the verdict, will warrant an appellate court in interfering.<sup>550</sup>

§ 5100. **Order by consent.** The Supreme Court will not hear any objections to an order entered by consent of parties.<sup>551</sup> A court of appellate jurisdiction can not reverse a judgment produced by the voluntary act of a party.<sup>552</sup> And no decision on any point rendered at the suggestion of the appellant can be

Id. 542; *Klink v. People*, 16 Col. 467; *Hornbein v. Blanchard*, 4 Col. App. 92; *Fugate v. Smith*, id. 201; § 5097, *ante*. Mistake in instructions not warranting a new trial. *O'Callaghan v. Bode*, 84 Cal. 489.

<sup>542</sup> As to form of judgment as entered, see *Ingersoll v. Bostwick*, 22 N. Y. 425; *Johnson v. Carnley*, 10 id. 570; *Witherhead v. Allen*, 28 Barb. 661; *Mayor of New York v. Lyons*, 24 How. Pr. 280; § 4758, *ante*; *Rankin v. Newman*, 107 Cal. 602.

<sup>543</sup> *Elwell v. Dodge*, 33 Barb. 336.

<sup>544</sup> *Johnson v. Farrell*, 10 Abb. Pr. 384. A judgment is not rendered ineffective by reason of being contained in the same document with the findings. *Hopkins v. Warner*, 109 Cal. 133.

<sup>545</sup> *People v. McCauley*, 1 Cal. 379; *Webster v. King*, 33 id. 348.

<sup>546</sup> See *Carpenter v. Haynes*, 1 N. Y. Code Rep. 414.

<sup>547</sup> *James v. Chalmers*, 6 N. Y. 209.

<sup>548</sup> *Towdy v. Ellis*, 22 Cal. 650.

<sup>549</sup> *People v. Lee*, 14 Cal. 510.

<sup>550</sup> *Gove v. Moses*, 1 Wash. Ter. 13; *Daws v. Glasgow*, Burn. 8; *Newby v. Territory of Oregon*, 1 Oreg. 163; *Tuller v. Arnold*, 93 Cal. 166.

<sup>551</sup> *Meerholz v. Sessions*, 9 Cal. 277.

<sup>552</sup> *Paul v. Armstrong*, 1 Nev. 82.



reviewed.<sup>553</sup> A judgment entered upon stipulation can not be reviewed, even though both parties consent.<sup>554</sup>

§ 5101. **Pleadings.** A judgment can not be reviewed on the ground of a defective complaint, or that the judgment is not warranted by the findings, on an appeal from an order denying a new trial.<sup>555</sup>

§ 5102. **Questions.** Questions not directly involved, and those unnecessary to a judgment of affirmance or reversal, will not be considered;<sup>556</sup> or questions not presented in good faith;<sup>557</sup> or questions not arising in the due course of litigation.<sup>558</sup> Questions of discretion of the judge can not be reviewed in the Supreme Court, except in cases of gross abuse, to the injury of the party;<sup>559</sup> or the refusal of the court or referee to allow a witness to be recalled;<sup>560</sup> or the allowance of a leading question;<sup>561</sup> or granting or refusing leave to amend a pleading.<sup>562</sup>

§ 5103. **Rulings.** Where a new trial was granted on one of several grounds, the order will not be reversed if it was in the

<sup>553</sup> *Fairbanks v. Corlies*, 3 E. D. Smith, 582; S. O., 1 Abb. Pr. 150; *Orser v. Grossman*, 4 E. D. Smith, 443. A question which has been excluded from the issues by the act of the appellant can not be considered on appeal. *Jones v. Morgan*, 67 Cal. 308.

<sup>554</sup> *Gridley v. Daggett*, 6 How. Pr. 280; *Townsend v. Masterson Stone Dressing Co.*, 15 N. Y. 587. So in special cases: *McAllister v. Albion Plank Road Co.*, 10 N. Y. 353; *Matter of Canal and Walker Streets*, 12 id. 406; *N. Y. Cent. R. R. v. Marvin*, 1 id. 276; *Commissioners of Gaines v. Albion Plank Road Co.*, 7 How. Pr. 301.

<sup>555</sup> *Jenkins v. Frink*, 30 Cal. 586; 89 Am. Dec. 134.

<sup>556</sup> *West v. Smith*, 5 Cal. 96.

<sup>557</sup> *People v. Pratt*, 30 Cal. 223.

<sup>558</sup> *Id.*

<sup>559</sup> *Smith v. Billett*, 15 Cal. 26; *Smith v. Richmond*, id. 501; *O'Brien v. Brady*, 23 id. 243; and see § 4974, *ante*.

<sup>560</sup> *Thomas v. Fleury*, 26 N. Y. 26; *Trimble v. Stilwell*, 4 E. D. Smith, 512.

<sup>561</sup> *Budlong v. Van Nostrand*, 24 Barb. 25.

<sup>562</sup> *United States v. Gurney*, 4 Cranch, 337; *Marine Ins. Co. v. Young*, 5 id. 187; *Barr v. Gratz*, 4 Wheat. 220; *Van Duzer v. Howe*, 21 N. Y. 531; *Hodges v. Tenn. Ins. Co.*, 8 id. 416; *Hunt v. Hudson River Fire Ins. Co.*, 2 Duer, 480; *Van Ness v. Bush*, 14 Abb. Pr. 33; *St. John v. Northrup*, 23 Barb. 25; *Hendricks v. Decker*, 35 id. 298; *Kissam v. Roberts*, 6 Bosw. 154; *Woodruff v. Hurson*, 32 Barb. 557; *Robbins v. Richardson*, 2 Bosw. 248; *Ford v. David*, 1 id. 569; *Gould v. Rumsey*, 21 How. Pr. 97; *Wright v. Hollingsworth*, 1 Pet. 165; *White v. Wright*, 22 How. (U. S.) 19; *Eberly v. Moore*, 24 id. 147; see § 4957, *ante*.



discretion of the court to make it upon any of the grounds stated.<sup>563</sup> But inconsequential rulings and decisions on which error is assigned will not be considered.<sup>564</sup> The ruling of the trial court upon a nonsuit presents a question of law, and, as such, must be both excepted to and specified as an error at law occurring at the trial and excepted to by the appellant.<sup>565</sup> The exception must appear in the stating or substantive part of the bill of exceptions or statement, and it is not enough that it be stated or referred to merely in the assignment of errors relied upon.<sup>566</sup> In reviewing a judgment rendered on motion for a nonsuit, all facts will be considered as proved which the evidence tends to prove.<sup>567</sup>

§ 5103a. **Subjects of review on appeal — miscellaneous.** The right of appeal is a legislative right, and he who relies upon the right must be able to show some positive authority therefor. Under Colorado practice, no appeal lies from a judgment of ouster entered by a District Court in an action for the usurpation of a public office.<sup>568</sup> Where a petition in intervention is denied, and no exception appears to have been taken by the intervenors, the correctness of the ruling is not open to review upon appeal by a defendant in the action.<sup>569</sup> An order consolidating actions will not be reviewed on appeal, unless an exception to the order is taken in the court below.<sup>570</sup> Nor can the question whether the trial court erred in striking out parts of an answer be presented upon an appeal from a judgment without a bill of exceptions.<sup>571</sup> But the action of the court on a motion to strike out a counterclaim will be deemed excepted

<sup>563</sup> Oullahan v. Starbuck, 21 Cal. 413; and see § 4850, *ante*.

<sup>564</sup> Paige v. O'Neal, 12 Cal. 483; Kisling v. Shaw, 33 id. 425; 91 Am. Dec. 644.

<sup>565</sup> Flashner v. Waldron, 86 Cal. 211; Alpers v. Hunt, id. 78; Schroeder v. Schmidt, 74 id. 459; Miller v. Wade, 87 id. 410; Gerlach v. Turner, 89 id. 446; Fogel v. Schmalz, 92 id. 412; Toulouse v. Pare, 103 id. 251; and see McKay v. Railway Co., 13 Mont. 15.

<sup>566</sup> Craig v. Water Co., 107 Cal. 675; Braverman v. Irrigation Co., 101 id. 644. See, also, as to review of rulings on motions for nonsuits, Burns v. Improvement Co., 4 Wash. St. 558; DeGraf v. Navigation Co., 10 id. 468; Lalande v. McDonald, 2 Idaho, 283.

<sup>567</sup> Creek v. McManus, 13 Mont. 152.

<sup>568</sup> Londoner v. People, 15 Col. 246.

<sup>569</sup> Grand Grove, etc., v. Garibaldi Grove, etc., 105 Cal. 219; see Henry v. Insurance Co., 16 Col. 179.

<sup>570</sup> Bangs v. Dunn, 66 Cal. 72; see Webb v. Trescony, 76 id. 621.

<sup>571</sup> Spence v. Scott, 97 Cal. 181.

to without a formal bill of exceptions, and will be reviewed on an appeal from the judgment.<sup>572</sup> An order striking out a portion of the complaint, not being itself appealable, may be reviewed on appeal from the final judgment.<sup>573</sup> But an order denying a motion to vacate a judgment can not be reviewed on appeal from the judgment.<sup>574</sup> Failure of jury to find upon the issue raised by a counterclaim in the defendant's answer, not being prejudicial to any of the plaintiff's rights, will not be reviewed on appeal.<sup>575</sup> An appeal from a judgment, where the only error apparent upon the record is manifestly a trivial clerical error in the computation of interest which would have been corrected by the court below, upon having its attention called to the matter, is frivolous. And the lower court will be directed to make the proper correction, and the appellate court will require the costs to be paid by the appellant, and allow the respondent damages for delay as part of the costs of appeal.<sup>576</sup> An appeal from a judgment regularly entered upon a personal contract, upon sufficient evidence to support it, and no evidence in support of the defense relied on, is unavailing.<sup>577</sup> Alleged error in overruling a demurrer to the complaint can be reviewed only on an appeal from the judgment, and not on an appeal from an order denying a new trial.<sup>578</sup> Alleged error in sustaining a demurrer will not be considered upon appeal, where it does not appear from the record upon appeal that such demurrer was interposed or sustained.<sup>579</sup> In every case where it is desired to review a motion on appeal, it should be made part of the record by a bill of exceptions, showing that the motion was made, and the ground upon which it was made. Error in the

<sup>572</sup> *Dodson v. Nevitt*, 5 Mont. 518.

<sup>573</sup> *Swain v. Burnette*, 76 Cal. 299. Review of order refusing to strike out pleading. See *Ganceart v. Henry*, 98 Cal. 281.

<sup>574</sup> *Jenness v. Bowen*, 77 Cal. 310.

<sup>575</sup> *Boot and Shoe Co. v. Stebbins*, 2 S. Dak. 74. Under laws of South Dakota, an order involving the merits of the action is appealable. See *Greeley v. Winson*, 2 S. Dak. 361.

<sup>576</sup> *Rountree v. Lime Co.*, 106 Cal. 62; see § 4841, *ante*.

<sup>577</sup> *McKenzie v. McMillen*, 14 Col. 50.

<sup>578</sup> *Heilbron v. Ditch Co.*, 76 Cal. 8.

<sup>579</sup> *Clark v. Taylor*, 91 Cal. 552. See further, as to review of alleged error in sustaining or overruling demurrer, *Wakeham v. Barker*, 82 id. 46; *Banbury v. Arnold*, 91 id. 606; *People v. Railroad Co.*, 76 id. 29; *Bates v. Babcock*, 95 id. 479; *Powell v. Railroad Co.*, 14 Oreg. 22; *Raymond v. Wimsette*, 12 Mont. 551; § 5058, *ante*.

granting of a motion must be made affirmatively to appear in the record.<sup>580</sup>

§ 5104. **When exception must be taken.** . It is a general rule of practice, that no point arising on the pleadings or evidence, which has not been brought to the notice of the inferior courts, will be reviewed on appeal, and such point or objection must be presented by bill of exceptions or statement; and that the appellate court will examine the case only upon the errors assigned by the appellant, and not look into the exceptions taken by respondent, even if made by stipulation.<sup>581</sup> Only errors com-

<sup>580</sup> *Herrlich v. McDonald*, 80 Cal. 472. Review upon appeal from an order granting or denying a new trial. See § 5065, *ante*; *South. Pac. R. R. Co. v. Superior Ct.*, 105 Cal. 84; *Storch v. McCain*, 85 id. 304; *Price v. Buchanan*, 12 Col. 366; *Gallatin Canal Co. v. Lay*, 10 Mont. 528; *Steuffen v. Jefferis*, 9 id. 66; *United States v. Trabing*, 3 Wyo. 144; *Kearney v. Snodgrass*, 12 Oreg. 311; *Kirk v. Matlock*, 12 id. 318. Review of verdict by court below. See *Bradshaw v. Degenhart*, 15 Mont. 267. Review of acceptance of juror over a party's objection for cause. *Davidson v. Bordeaux*, 15 Mont. 245. Review of action of trial court in directing a verdict. *De Lendresle v. Peck*, 1 N. Dak. 422. Review of order in special probate proceedings. *In re Ohm*, 82 Cal. 160. Appeal from order directing payment of family allowance, effect of. *Ruggles v. Superior Ct.*, 103 Cal. 125.

<sup>581</sup> *Jackson v. F. R. Water Co.*, 14 Cal. 18; *Paul v. Magee*, 18 id. 699. In an appellate court only such matters will be examined for error as are complained of, and were brought distinctly before the court below at the time of trial. *Gaines v. White*, 2 S. Dak. 410; *Pierce v. Manning*, id. 517; *Melshelmer v. Hommel*, 15 Col. 475; *Murdock v. Clarke*, 90 Cal. 427; *Wood v. Whitton*, 66 Iowa, 295; *Faust v. Goodnow*, 4 Col. App. 352; *Miller v. Sharpe*, id. 559; *Denver v. Soloman*, 2 id. 534; *Gypsum Co. v. Ferguson*, id. 219; *Lucas v. Richardson*, 68 Cal. 618; *King v. Rea*, 13 Col. 69; *Allen v. King*, 4 Col. App. 319. Matters not appearing in the record can not be considered on appeal. *Taber v. Clark*, 15 Col. 434; and see *Coffin v. Taylor*, 16 Oreg. 375; *Eltzroth v. Ryan*, 89 Cal. 135; *State v. Rohde*, 8 Wash. St. 362; *Fisher v. United States*, 1 Okl. 252; *West v. Crawford*, 80 Cal. 20; *Maling v. Crummey*, 5 Wash. St. 222; *Evans v. Jones*, 10 Utah, 182; *Kelley v. Murphy*, 70 Cal. 560. And when the record shows no foundation for the errors assigned they will be disregarded on appeal. *Leach v. Lothian*, 10 Col. 439. Indefinite exceptions, pointing out no specific defect, will not be considered. *Healy v. Seward*, 5 Wash. St. 319. An objection to the form of a special verdict, if not taken before the verdict is received and recorded, will not be considered on appeal. *Water Co. v. Richardson*, 72 Cal. 598. An objection that two causes of action were improperly joined comes too late when made for the first time in the appellate court. *Davis v. Johnson*, 4 Col. App. 545; and see *Simonton v. Rohm*, 14 Col. 51.

mitted against the appellant will be examined.<sup>582</sup> But objections which could not possibly have been obviated, though not mentioned before, may be raised at any time.<sup>583</sup> Such objection must go to the substance of the cause of action, and not to its technical form of statement.<sup>584</sup> So objections to the jurisdiction of the court;<sup>585</sup> or to absence of any cause of action in the complaint;<sup>586</sup> or where the complaint contains such defects as to show that plaintiff could not at any time obtain any judgment upon the cause of action alleged;<sup>587</sup> or where a bill in equity shows on its face that plaintiff is not entitled to relief, even though no demurrer be filed;<sup>588</sup> or where objections to evidence, though not made in the court below, could not be under any circumstances there obviated.<sup>589</sup>

§ 5104a. **Assignment of errors — generally.** The party alleging error in the appellate court must be able to establish affirmatively the existence of such error by the record.<sup>590</sup> And where the court is unable to determine from an inspection of the record whether error was committed by the trial court, there is no rule or practice requiring it to look elsewhere for information.<sup>591</sup> Errors not embraced in the assignment of errors will not be considered.<sup>592</sup> Nor will a general and vague assign-

<sup>582</sup> *Seaward v. Malotte*, 15 Cal. 304.

<sup>583</sup> *Beekman v. Frost*, 18 Johns. 544; 9 Am. Dec. 246; *Palmer v. Lorillard*, 16 Johns. 348; *Cole v. Blunt*, 2 Bosw. 116; *Sanford v. Granger*, 12 Barb. 392; *Pepper v. Haight*, 20 id. 429.

<sup>584</sup> *Mott v. Smith*, 16 Cal. 533.

<sup>585</sup> *Id.*; *Valarino v. Thompson*, 7 N. Y. 576; *First Nat. Bank v. Carter*, 10 Wash. St. 11.

<sup>586</sup> Cal. Code Civ. Pro., § 434; *Russell v. Byron*, 2 Cal. 86; *Gregory v. Ford*, 14 id. 138; 73 Am. Dec. 639; *Barron v. Frink*, 30 Cal. 486; *Himmelman v. Danos*, 35 id. 441; *Cole v. Blunt*, 2 Bosw. 116; *Rayner v. Clark*, 7 Barb. 581; *Lounsbury v. Purdy* 18 N. Y. 515.

<sup>587</sup> *Hentsch v. Porter*, 10 Cal. 555.

<sup>588</sup> *White v. Fratt*, 13 Cal. 521.

<sup>589</sup> *Mott v. Smith*, 16 Cal. 533.

<sup>590</sup> *Kent v. Insurance Co.*, 2 S. Dak. 300; *Houghton v. Clarke*, 80 Cal. 417; *Marshall v. Hancock* id. 82; *Campbell v. Walls*, 77 id. 250; *Tucker v. Flouring Mills Co.*, 13 Oreg. 28; *Danvers v. Durkin*, 14 id. 37; *People v. Gillis*, 97 Cal. 542; *In re Weringer*, 100 id. 345.

<sup>591</sup> *Machinery Co. v. Publishing Co.*, 4 Col. App. 146; *Hadra v. Utah Nat. Bank*, 9 Utah, 412; and see *Wheelock v. Godfrey*, 100 Cal. 578; *In re Estate of Smiley*, 4 Col. App. 582; *Brahoney v. Railway Co.*, 14 Col. 27.

<sup>592</sup> *Boynton v. Longley*, 19 Nev. 69; *Cunningham v. Railway Co.*, 8 Wash. St. 471; and see cases cited in notes to preceding section.

ment of an error be considered. A party complaining of error must specify it with precision.<sup>593</sup> He must put his finger on the error complained of.<sup>594</sup> An appellant can not assail for the first time in the appellate court errors which it was his right to have had corrected in the court below.<sup>595</sup> Thus, a party can not allow evidence to be introduced at the trial without objection, and afterwards, upon an appeal, make an objection which might have been obviated if he had made it when the evidence was offered.<sup>596</sup>

§ 5104b. **Waiver of objections — miscellaneous.** Error arising upon a ruling of the court in regard to the right of argument can not be urged on appeal after waiver at the trial.<sup>597</sup> When opposing counsel refrains from objecting at the time to improper argument, and the trial court afterwards refuses relief, reviewing

<sup>593</sup> *State v. Chapman*, 1 S. Dak. 414; *State v. Leehman*, 2 id. 171; *Marks v. Tompkins*, 7 Utah, 421.

<sup>594</sup> *Swift v. Mulkey*, 17 Oreg. 532; *Woodruff v. County of Douglas*, id. 314. Under Oregon practice, no objection to the rulings or proceedings of the trial court in either civil or criminal cases will be considered on appeal unless there was an objection, a ruling thereon, and an exception, all properly incorporated into a bill of exceptions. *State v. Abrams*, 11 Oreg. 172; *State v. Foot You*, 24 id. 61.

<sup>595</sup> *Bethel v. Robinson*, 4 Wash. St. 446, and cases cited in notes to preceding section.

<sup>596</sup> *Shain v. Sullivan*, 106 Cal. 208; *Reese v. Kinkhead*, 20 Nev. 65; § 4738, *ante*; and see, in further illustration of the rule, the cases following: *People v. Reis*, 76 Cal. 269; *In re Robinson*, 106 id. 493; *Bast v. Hysom*, 6 Wash. St. 170; *Morgan v. Bell*, 3 id. 554; *Washington Iron Works v. Jensen*, id. 584; *Johnson v. Lumber Co.*, id. 722; *Bozzio v. Vaglio*, 10 id. 270; *Main v. Johnson*, 7 id. 321; *Earles v. Bigelow*, id. 581; *Patchen v. Machinery Co.*, 6 id. 486; *Sweeney v. Elevator Co.*, 14 id. 562; *Miller v. Vermurle*, 7 id. 386; *Kutcher v. Love*, 19 Col. 542; *Town of Salida v. McKinna*, 16 id. 523; *Bourke v. Van Keuren*, 20 id. 95; *Layton v. Kirkendall*, id. 236; *Metzler v. James*, 12 id. 322; *Ayres v. Shields*, 14 id. 475; *Roy v. Mercantile Co.*, 3 Wyo. 417; *Redman v. Railway Co.*, id. 678; *Heilner v. Brown*, 2 Idaho, 242; *Darby v. Heagerty*, id. 260; *Parker v. Wardner*, id. 265; *People v. Peacock*, 5 Utah, 237; *Sweeney v. Railway Co.*, 11 Mont. 523; *Brand v. Servoss*, id. 86; *Hall v. Harris*, 2 S. Dak. 331; affirming S. O., 1 id. 279; *Little v. Little*, 2 N. Dak. 175; *Crabtree v. Segrist*, 3 N. Mex. 278; *Williams v. Thomas*, id. 324. An exception taken below is not necessary to the review of a judgment on the pleadings. *Johnson v. Manning*, 2 Idaho, 1073; see § 4739, *ante*.

<sup>597</sup> *State v. Ackles*, 8 Wash. St. 462.

tribunals, invoking a rule analogous to that of estoppel, frequently decline also to interfere.<sup>598</sup> An objection that the court had no jurisdiction to settle a bill of exceptions is waived by a party who is present and participates in the settlement without urging the objection.<sup>599</sup> Where there is no oral argument, and the brief simply refers to the folio of the record where the exceptions are to be found, but contains no argument in relation thereto, they will be held to be waived.<sup>600</sup> An objection by a respondent to the jurisdiction of the Supreme Court to entertain the appeal, on the ground that it does not appear that the notice of appeal was served, will not be considered by the court, where the objection was not taken and notified to the appellant in writing ten days before the hearing as provided for by the Supreme Court rules.<sup>601</sup> If the record on appeal does not show that findings were not made, a waiver will be presumed in support of the judgment.<sup>602</sup> When a motion for nonsuit is made by the defendant at the close of the plaintiff's testimony because of its insufficiency, and overruled, if the defendant then introduces his testimony, he waives his right to have the error in overruling the motion reviewed.<sup>603</sup> Where the defendants, in the trial court, question the sufficiency of the complaint by demurrer, and the demurrer is overruled, and the ruling is not saved by bill of exceptions, another demurrer raising the same question can not be interposed on appeal.<sup>604</sup> Objection to a juror on the ground of alienage may be waived, either expressly or by failure to object at the proper time.<sup>605</sup>

§ 5105. **Evidence.** Objections to evidence must be entered of record below;<sup>606</sup> or objections that there was no proof of the absence of witnesses whose depositions were read.<sup>607</sup> Where a material fact was assumed in the court below, without any ob-

<sup>598</sup> *Cook v. Doud*, 14 Col. 483.

<sup>599</sup> *Walsh v. Mueller*, 14 Mont. 76; *Coquard v. Weinstein*, 15 id. 554; and see *Stufflebeam v. Montgomery*, 2 Idaho, 763; § 5050, *ante*.

<sup>600</sup> *Neylan v. Green*, 82 Cal. 128.

<sup>601</sup> *Pedrorena v. Hotchkiss*, 95 Cal. 636.

<sup>602</sup> *Goyhinech v. Goyhinech*, 80 Cal. 410.

<sup>603</sup> *Chamberlain v. Woodin*, 2 Idaho, 609.

<sup>604</sup> *Guthrie v. Fisher*, 2 Idaho, 101; *Guthrie v. Phelan*, id. 89.

<sup>605</sup> *Territory v. Hart*, 7 Mont. 489.

<sup>606</sup> *Potter v. Karney*, 8 Cal. 574; *Mott v. Smith*, 16 id. 535; *Payne v. Treadwell*, id. 247; *Mechanics' Bank of Alexandria v. Seton*, 1 Pet. 299.

<sup>607</sup> *Lockhart v. Mackie*, 2 Nev. 294.

jection of the want of evidence thereof, such objection can not be raised upon appeal.<sup>608</sup> Exceptions to the admissibility of a deed in evidence must be taken advantage of at *nisi prius*.<sup>609</sup> Where parol testimony to vary the terms of a written agreement is offered, and received without objection, the objection that it was inadmissible can not be raised in the Supreme Court.<sup>610</sup> If incompetent evidence is admitted and treated as competent, the question of its competency can not be raised in the appellate court.<sup>611</sup> Where the objection to the admission of testimony on the trial is general, it can not be made special for the first time in the Supreme Court.<sup>612</sup>

§ 5106. **Findings.** The findings of the jury on issues submitted to them in an equity case, if not objected to by motion for new trial, can not be reviewed.<sup>613</sup> So with objections to a master's report;<sup>614</sup> or to the report of commissioners appointed to ascertain an amount due.<sup>615</sup> If the court, in its finding of fact fails to find an issue made in the pleadings, the defect must be accepted to in the court below;<sup>616</sup> so of the omission to find upon a particular question of fact.<sup>617</sup> The only question that can be raised in the Supreme Court upon the findings, if no exception is taken to them, is, Are they consistent with the judgment?<sup>618</sup>

<sup>608</sup> *Jencks v. Smith*, 1 N. Y. 40; *Paige v. Fazackerly*, 36 Barb. 392; *Munson v. Hegeman*, 10 id. 112; *Willard v. Bridge*, 4 id. 361; *Hunter v. Sandy Hill*, 6 Hill, 410; *Thurman v. Cameron*, 24 Wend. 87; *Oakley v. Van Horne*, 21 id. 305; *Ford v. Monroe*, 20 id. 211; *Beekman v. Bond*, 19 id. 444; *Patterson v. Westervelt*, 17 id. 545; *Jackson v. Roberts*, 11 id. 422; *Burnett v. Lyford*, 92 Cal. 117; and see preceding section.

<sup>609</sup> *Posten v. Rasette*, 5 Cal. 467.

<sup>610</sup> *Tebbs v. Weatherwax*, 23 Cal. 58.

<sup>611</sup> *Curlac v. Packard*, 29 Cal. 194.

<sup>612</sup> *People v. Glenn*, 10 Cal. 32.

<sup>613</sup> *Duff v. Fisher*, 15 Cal. 375.

<sup>614</sup> *Hudgins v. Kemp*, 20 How. Pr. 45, 54; *Kinsman v. Parkhurst*, 18 id. 289.

<sup>615</sup> *The Virgin*, 8 Pet. 538.

<sup>616</sup> *Merrill v. Chapman*, 34 Cal. 251.

<sup>617</sup> *Sharp v. Wright*, 35 Barb. 236; *Ingraham v. Gilbert*, 20 id. 151; *People v. Albright*, 14 Abb. Pr. 305; 23 How. Pr. 306; *Heroy v. Kerr*, 8 Bosw. 194; 21 How. Pr. 409; *Hulce v. Sherman*, 13 id. 411; *Platte v. Thorne*, 8 Bosw. 574.

<sup>618</sup> *James v. Williams*, 31 Cal. 211; *Lucas v. San Francisco*, 28 id. 591; see § 5095, *ante*.



§ 5107. **Instructions.** Where instructions to the jury are not excepted to at the time they are given or refused, they can not be considered on appeal.<sup>619</sup> So as to the objection that the court directed the jury to find specially as to a particular fact.<sup>620</sup>

§ 5108. **Irregularity in proceedings.** The objection that the jury in the court below was not duly selected and summoned as required by law must be excepted to in the court below.<sup>621</sup> As to the improper allowance of interest on a running account, no objection being taken for that reason to the judgment or finding of the referee, the judgment will not be reversed.<sup>622</sup> Where no exceptions were taken to the reading of the statute law and decisions of the Supreme Court to the jury, there is no ground of error;<sup>623</sup> or to the reading of a portion of answer which had been stricken out;<sup>624</sup> or that an account presented to the supervisors of a county was not authenticated, as required by statute, can not be taken in the Supreme Court for the first time.<sup>625</sup>

§ 5109. **Parties.** To be reviewable, objection must be taken to parties or the joinder of parties in the court below;<sup>626</sup> or that certain parties could not intervene.<sup>627</sup>

§ 5110. **Pleadings.** Exceptions must be taken in the court below to objections to the form of a complaint or answer;<sup>628</sup> or that a supplemental complaint should have been filed;<sup>629</sup> or that two counts in a complaint on an equitable action should not be tried by a jury;<sup>630</sup> or an objection to the complaint which

<sup>619</sup> *Collier v. Corbett*, 15 Cal. 186; *Payne v. Treadwell*, 16 id. 247; *Letter v. Putney*, 7 id. 423; *St. John v. Kidd*, 26 id. 263; and see § 4751, *ante*.

<sup>620</sup> *People v. Chu Quong*, 15 Cal. 332.

<sup>621</sup> *Spencer v. Doane*, 23 Cal. 419.

<sup>622</sup> *Whiting v. Clark*, 17 Cal. 407.

<sup>623</sup> *People v. Galvin*, 9 Cal. 115.

<sup>624</sup> *Morgan v. Hugg*, 5 Cal. 409.

<sup>625</sup> *Randall v. Yuba Co.*, 14 Cal. 219.

<sup>626</sup> *Sands v. Pfeiffer*, 10 Cal. 258. *The Commander-in-Chief*, 1 Wall. 43; *Livingston v. Woodworth*, 15 How. (U. S.) 546.

<sup>627</sup> *McKenty v. Gladwin*, 10 Cal. 227.

<sup>628</sup> *Sutter v. Cox*, 6 Cal. 415; *People v. Jones*, 20 id. 50; *Peterson v. Hornblower*, 33 id. 266; *King v. Davis*, 34 id. 100; *Kuhland v. Sedgwick*, 17 id. 123.

<sup>629</sup> *Van Maren v. Johnson*, 15 Cal. 308.

<sup>630</sup> *Baker v. Joseph*, 16 Cal. 173.



defeats only plaintiff's present right to recover;<sup>681</sup> or that the complaint is defective, because it is not alleged that plaintiff's claim was presented to the administrator for allowance.<sup>682</sup> If the plaintiff, on the trial, treats an allegation of the complaint as denied in the answer, he can not raise the point in the Supreme Court for the first time that such allegation is not denied.<sup>683</sup> So in matters of defense not brought forward at the trial.<sup>684</sup>

<sup>681</sup> Hentsch v. Porter, 10 Cal. 555.

<sup>682</sup> Peterson v. Hornblower, 33 Cal. 266.

<sup>683</sup> Racouillat v. Rene, 32 Cal. 450. Objections raised in court below. See § 4738, *ante*.

<sup>684</sup> Bell v. Bruen, 1 How. (U. S.) 169; Findlay v. Hinde, 1 Pet. 241.

## CHAPTER IV.

### PRINCIPLES OF DETERMINATION.

§ 5111. **In general.** The question before an appellate court is, Was the judgment correct? — not the ground on which the judgment professed to proceed.<sup>1</sup> The Supreme Court may direct the court below to render the proper judgment.<sup>2</sup> And the court below has no authority to enter a different judgment from that directed.<sup>3</sup> It can not revise its own judgments, but when proceedings founded on them are brought up for review, it will make such orders as are necessary to cause the judgment to be enforced.<sup>4</sup> An erroneous judgment can not be corrected by bringing suit in the nature of a bill of review; the proper method is by appeal.<sup>5</sup> The practice of giving the reason in writing for judgment is of modern origin. It is discretionary with the court whether it give an opinion upon pronouncing judgment, and if given, whether it be oral or in writing.<sup>6</sup> Existing laws at the time the proceedings were had are to govern the decision on appeal.<sup>7</sup> And this court is bound to decide according to the law of the whole case, and not upon particular points raised by counsel.<sup>8</sup> In chancery cases, the Supreme Court has full power and jurisdiction, for the purposes of equity, to correct errors of the court below in whatever shape or by whatever party appeal is taken up.<sup>9</sup> Errors which the court below can and will correct on motion should not be made the ground of an appeal;<sup>10</sup> such as clerical and arithmetical errors,<sup>11</sup> or errors

<sup>1</sup> Davis v. Packard, 6 Pet. 41.

<sup>2</sup> Love v. Shartzer, 31 Cal. 487; 91 Am. Dec. 542.

<sup>3</sup> Argenti v. Sawyer, 32 Cal. 414; Meyer v. Kohn, 33 id. 484.

<sup>4</sup> Argenti v. San Francisco, 30 Cal. 458.

<sup>5</sup> Savings and Loan Society v. Thompson, 34 Cal. 76.

<sup>6</sup> Houston v. Williams, 13 Cal. 24; 73 Am. Dec. 565.

<sup>7</sup> Hancock v. Thorn, 46 Cal. 643; United States v. The Peggy, 1 Cranch, 103; Hartung v. People, 22 N. Y. 95; § 4938, *ante*.

<sup>8</sup> Consult *post*, "Law of the Case," under "Remittitur;" Hubbard v. Sullivan, 18 Cal. 508.

<sup>9</sup> Grayson v. Guild, 4 Cal. 122.

<sup>10</sup> Bunbury v. Bolton, 1 Bro. P. C. 434.

<sup>11</sup> Rogers v. Hosack, 18 Wend. 319.

which might have been cured by amendment, or questions as to variance or regularity.<sup>12</sup> The general rule is, that if error intervenes the judgment must be reversed, and error imports injury to the party against whom it is committed, unless it affirmatively appear that no injury did or could occur to him thereby.<sup>13</sup> But if during subsequent proceedings the foundation of the error is overthrown, and facts are shown to support the rulings of the court, the error is cured.<sup>14</sup> Or where error in course of the trial was fully corrected, or the exception waived.<sup>15</sup> When a finding is sought to be impeached, the appellate court will look into the evidence for the purpose of supporting it.<sup>16</sup> And all the findings in an action must be construed together.<sup>17</sup> And a finding of fact may be construed by a finding of law.<sup>18</sup> The appellate court must look into the record to see if there is any foundation for a judgment appealed from.<sup>19</sup> But where appellant presents no argument or authorities in support of an alleged error, the appellate court will not consider the assignment of error, unless the error is so unmistakable that it reveals itself by a casual inspection of the record.<sup>20</sup>

§ 5112. **Errors in evidence.** Where this court sees clearly and beyond doubt that the admission or rejection of improper evidence could in no way materially affect the result, the judgment on that ground will not be disturbed;<sup>21</sup> or where it could

<sup>12</sup> N. Y. Central Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85; Bates v. Graham, 1 id. 237; Lounsbury v. Purdy, 18 N. Y. 515; Ingersoll v. Bostwick, 22 id. 425; Bennett v. Judson, 21 id. 238; Cardell v. McNiel, id. 341; Lake Ontario R. R. v. Marvine, 18 id. 585; McCormick v. Pickering, 4 id. 276; § 5076, *ante*.

<sup>13</sup> Rice v. Heath, 39 Cal. 609; Sweeney v. Reilly, 42 id. 402.

<sup>14</sup> People v. Anderson, 26 Cal. 130.

<sup>15</sup> Schenectady & Saratoga R. R. Co. v. Thatcher, 11 N. Y. 102; Kent v. Harcourt, 33 Barb. 491; Miller v. The Eagle Life and Health Ins. Co., 2 E. D. Smith, 284; Colvin v. Burnet, 2 Hill, 620; Hearsey v. Pruyn, 7 Johns. 179; Oakes v. Thornton, 28 N. H. 44.

<sup>16</sup> Spencer v. Ballou, 18 N. Y. 327; but see Cady v. Allen, id. 573; Stewart v. Smith, 14 Abb. Pr. 75.

<sup>17</sup> Polack v. McGrath, 38 Cal. 666.

<sup>18</sup> Smith v. Devlin, 23 N. Y. 363.

<sup>19</sup> Howard v. Richards, 2 Nev. 128.

<sup>20</sup> Allison v. Hagan, 12 Nev. 38; § 5076, *ante*.

<sup>21</sup> Persse v. Cole, 1 Cal. 369; Mills v. Barney, 22 id. 240; Kidd v. Temple, id. 255; Henry v. Evarts, 30 id. 425; Hastings v. Jackson, 46 id. 234; Lowery v. Steward, 3 Bosw. 505; Boyd v. Foot, 5 id. 110; Davies v. Steamship Co., 89 Cal. 280.

have no effect on the verdict;<sup>22</sup> or when it is plain that the result must have been the same without such evidence;<sup>23</sup> or where defendant had suffered no injury thereby;<sup>24</sup> or where the findings show that the evidence improperly admitted was disregarded;<sup>25</sup> or if the party would not have been entitled to recover if the excluded testimony had been admitted;<sup>26</sup> as where there was sufficient uncontradicted evidence to warrant the verdict;<sup>27</sup> or where the same facts were afterwards proved by competent evidence;<sup>28</sup> or where admitted by the pleadings.<sup>29</sup> So the improper exclusion of evidence upon a question finally decided in favor of appellant will not be a ground for reversing the judgment;<sup>30</sup> or the exclusion of a question which had been already answered in substance by the witness;<sup>31</sup> or permitting a witness to be questioned as to his opinion, provided the answer only stated facts<sup>32</sup> or forbidding a witness to testify from a written paper, if he did not subsequently give any testimony.<sup>33</sup> So the refusal to permit an answer to a proper question becomes immaterial by the introduction of the same matter under a subsequent interrogatory;<sup>34</sup> or the improper exclusion of a witness if the fact proposed to be proved by him could not have affected the result.<sup>35</sup>

§ 5113. **Error in law.** A new trial will not be granted on account of the erroneous rejection of certain evidence, if evidence was subsequently given without contradiction which en-

<sup>22</sup> *Young v. Emerson*, 18 Cal. 416.

<sup>23</sup> *Belmont v. Coleman*, 1 Bosw. 188.

<sup>24</sup> *Hicks v. Whiteside*, 23 Cal. 404; *Palge v. O'Neal*, 12 id. 483; *Hoag v. Pierce*, 28 id. 187; *Tyler v. Green*, id. 406; 87 Am. Dec. 130; *Boyce v. Cal. Stage Co.*, 25 Cal. 460; *Norwood v. Kenfield*, 30 id. 393; *Moon v. Rollins*, 36 id. 833; 95 Am. Dec. 181.

<sup>25</sup> *Bee v. S. F. & H. B. R. R. Co.*, 46 Cal. 249.

<sup>26</sup> *Merle v. Mathews*, 26 Cal. 455.

<sup>27</sup> *Zeigler v. Wells, Fargo & Co.*, 28 Cal. 263.

<sup>28</sup> *Schenck v. Dart*, 22 N. Y. 420.

<sup>29</sup> *Castree v. Gavelle*, 4 E. D. Smith, 425; and see § 5093, *ante*.

<sup>30</sup> *Beekman v. Platner*, 15 Barb. 550; § 4903, *ante*; and see *Gillisple v. Hagans*, 90 Cal. 90; *Cowan v. Cowan*, 16 Col. 335; *Winter v. Fulstone*, 20 Nev. 260.

<sup>31</sup> *Park Bank v. Tilton*, 15 Abb. Pr. 384.

<sup>32</sup> *Dolittle v. Eddy*, 7 Barb. 74.

<sup>33</sup> *Howland v. Willetts*, 9 N. Y. 170.

<sup>34</sup> *Real Del Monte G. & S. M. Co. v. Thompson*, 22 Cal. 542.

<sup>35</sup> *City Bank of Brooklyn v. Dearborn*, 20 N. Y. 244.

titled the adverse party to recover;<sup>36</sup> submission of a question to the jury, proper for the court, where the decision by the court must have been the same;<sup>37</sup> error in instructions on a point entirely immaterial to the case;<sup>38</sup> or which could not possibly have misled the jury;<sup>39</sup> or where an instruction was defective by reason of an omission, but the omission was supplied in another instruction given.<sup>40</sup>

§ 5114. **Error in pleadings.** If the court refuses to allow defendant to amend his answer, but no injury results from the refusal, the judgment will not be reversed on this ground;<sup>41</sup> nor for defects in the complaint, where it can be gathered therefrom as a whole that the plaintiff had a cause of action upon which he was entitled to judgment, however defectively the cause of action may have been stated.<sup>42</sup>

§ 5115. **Harmless errors.** A judgment will not be reversed for error that can in no respect injure the appellant;<sup>43</sup> unless it affirmatively appear that injustice has been done;<sup>44</sup> or for errors not affecting substantial rights;<sup>45</sup> or for errors of the court which do not materially affect the merits of the case;<sup>46</sup> or when appellant has no interest in the subject-matter;<sup>47</sup> or for errors which affect only the rights of parties who have not appealed.<sup>48</sup> A party is not injured by an error if the error does not prevent him from making out his case.<sup>49</sup>

§ 5115a. **The same — continued.** When it appears that the error complained of was not prejudicial it will not be con-

<sup>36</sup> *Gildersleeve v. Mahoney*, 5 Duer, 383; § 4903, *ante*.

<sup>37</sup> *Miller v. Eagle Life and Health Ins. Co.*, 2 E. D. Smith, 269.

<sup>38</sup> *Willoughby v. Comstock*, 3 Hill, 389; *Hayden v. Palmer*, 2 id. 205.

<sup>39</sup> *Johnson v. Hudson River R. R. Co.*, 20 N. Y. 74.

<sup>40</sup> *Livermore v. Stine*, 43 Cal. 274; § 4905, *ante*.

<sup>41</sup> *Jones v. Block*, 30 Cal. 227.

<sup>42</sup> *Hallock v. Jaudin*, 34 Cal. 167; § 311, *ante*.

<sup>43</sup> *Kilburn v. Ritchie*, 2 Cal. 145; 56 Am. Dec. 326; *Wilkinson v. Parrott*, 32 Cal. 102; *Garwood v. Wood*, 34 id. 248; *Mott v. Reyes*, 45 id. 379; *Campbell v. Pratt*, 2 Pet. 354.

<sup>44</sup> *Broadus v. Nelson*, 16 Cal. 80; *Robinson v. Smith*, 14 id. 254.

<sup>45</sup> *Peters v. Foss*, 20 Cal. 586.

<sup>46</sup> *Clayton v. West*, 2 Cal. 381; *Carpentier v. Gardiner*, 29 id. 160.

<sup>47</sup> *Hobbs v. Duff*, 43 Cal. 485.

<sup>48</sup> *Speyer v. Ihmels*, 21 Cal. 280; 81 Am. Dec. 157.

<sup>49</sup> *Hebrard v. Jefferson G. & S. M. Co.*, 33 Cal. 290.

sidered.<sup>50</sup> A ruling, although technically erroneous, if not prejudicial to the rights of the party complaining, does not constitute reversible error.<sup>51</sup> Where the record shows that the appellant is not entitled to recover in any event, error in the rulings of the court upon the admission of evidence can not entitle him to a reversal of the judgment.<sup>52</sup> So, generally speaking, an error of the court in ruling upon the admission of evidence that conclusively appears to be innoxious, and could have worked no prejudice to the party objecting, is no ground for reversal.<sup>53</sup> The admission of erroneous evidence is harmless, and no ground for reversal, when there is abundance of other evidence, without substantial conflict, to sustain the finding of fact which such evidence tends to prove.<sup>54</sup> So, the rejection of evidence which if admitted would not have improved the case of the party offering it, is not such error as should reverse the judgment.<sup>55</sup> The reception of immaterial or irrelevant testimony, when a cause is tried before a referee, is not, of itself, reversible error.<sup>56</sup> Nor is it reversible error where a witness is not permitted to answer a proper question, but at another time is allowed to answer it in effect.<sup>57</sup> The admission of incompetent testimony in rebuttal of immaterial evidence is harmless error.<sup>58</sup> And error in permitting a leading question to be asked

<sup>50</sup> Willard v. Mellor, 19 Col. 534; Castagno v. Carpenter, 14 id. 524; Hegar v. De Groat, 3 N. Dak. 354; United States v. Alexander, 2 Idaho, 354; People v. Neyce, 86 Cal. 393; Denver Hardware Co. v. Croke, 4 Col. App. 530; Brown v. Hillen, id. 45; School District v. Ross, id. 498; Tramway Co. v. Reid, id. 53, 500; Williams v. Carr, id. 363.

<sup>51</sup> Andrews v. Carlile, 20 Col. 370; Brooks v. Bradford, 4 Col. App. 410; Faust v. Goodnow, id. 352; Quimby v. Tedford, id. 210; Prairie School Township v. Hoselen, 3 N. Dak. 328; Jackson v. Burnham, 20 Col. 532.

<sup>52</sup> McPhail v. Buell, 87 Cal. 115.

<sup>53</sup> State v. McGahey, 3 N. Dak. 293; Dolan v. Paradise, 4 Col. App. 314; State v. Kraft, 20 Oreg. 28; Norton v. Whitehead, 84 Cal. 263; Gram v. Railroad Co., 1 N. Dak. 252; Fairhaven Land Co. v. Jordon, 5 Wash. St. 729; Crane v. Dexter, id. 479; Woo Dan v. Power Co., id. 466.

<sup>54</sup> Silvarer v. Hausen, 77 Cal. 579; Mining Co. v. Haws, 7 Utah, 515; Benson v. Hart, 10 Wash. St. 301; and see § 4902, *ante*.

<sup>55</sup> Haley v. Elliott, 20 Col. 379.

<sup>56</sup> Rollins v. Commissioners, 15 Col. 104; Groth v. Kersting, 4 Col. App. 395; Mining Co. v. Taylor, 100 U. S. 37.

<sup>57</sup> Territory v. Collins, 6 Dak. 234.

<sup>58</sup> Klepsch v. Donald, 8 Wash. St. 162.

is harmless when the question is upon an immaterial matter.<sup>59</sup> A judgment which is correct will not be overthrown because the reasoning of the trial court which led to the result may have been inaccurate.<sup>60</sup> Technical questions of practice are deemed unimportant upon appeal, where, notwithstanding them, the cause has been fully and fairly tried upon the evidence.<sup>61</sup> And in an equity proceeding, the appellate court looks at the substance of the case as presented below, and not at any technical exceptions or objections made therein.<sup>62</sup> The refusal of the court to strike out improper remarks of counsel at the time of their utterance is harmless error, where the court later instructs the jury to disregard them.<sup>63</sup> Where the bill of exceptions does not contain, or purport to contain, all the evidence, an erroneous ruling in the admission of evidence can not be held prejudicial on appeal.<sup>64</sup> An appeal from an order made at the request of the appellant, and which could not operate to his prejudice, will not be considered.<sup>65</sup> Error arising in impaneling a jury is not prejudicial to the defendant, if, under the evidence presented to such jury, the court is warranted in instructing it to render a verdict for the plaintiff.<sup>66</sup> Denial of a motion for a continuance will not be disturbed on appeal, where it appears that the defendant did not use due diligence in endeavoring to secure the attendance or depositions of absent witnesses.<sup>67</sup> Refusal of the court to compel the plaintiff, on motion, to elect between two causes of action is not prejudicial error, if the election be made by the plaintiff at the opening of the trial.<sup>68</sup> A variance between the complaint and the evidence as to the date of a deed for lots, the title to which was taken by the defendant for the plaintiff as a resulting trust, is an error which should have been corrected by amendment, but such error is harmless, and is no ground for reversal.<sup>69</sup> Although the court may have erroneously treated the trial of a cause as an action at law instead of in equity, and permitted a

<sup>59</sup> Pilling v. Morse, 5 Wash. St. 797.

<sup>60</sup> Warren v. Hall, 20 Cal. 508.

<sup>61</sup> Delamater v. Smith, 14 Wash. St. 261.

<sup>62</sup> Smith v. Taylor, 2 Wash. St. 422.

<sup>63</sup> State v. Regan, 8 Wash. St. 506.

<sup>64</sup> Brown v. Casey, 80 Cal. 504.

<sup>65</sup> *In re* Radovich, 74 Cal. 536.

<sup>66</sup> Clancy v. Reis, 5 Wash. St. 371.

<sup>67</sup> Oreg., etc., Nav. Co. v. Dacres, 1 Wash. St. 195.

<sup>68</sup> Van Hook v. Burns, 10 Wash. St. 22.

<sup>69</sup> Thomas v. Jameson, 77 Cal. 91.

jury trial, yet the error will be regarded as harmless on appeal, when it appears from a review of the proofs, all of which had been preserved in the record, that the jury reached a correct conclusion and that the finding of the court must have been the same as that of the jury.<sup>70</sup> When prejudicial error affirmatively appears on the face of the record, the appellate court can not presume that it was harmless. The matter rendering it harmless should appear in the bill of exceptions.<sup>71</sup>

§ 5116. **Rule of conflict of evidence.** If the evidence clearly preponderates against the verdict or finding, it is the duty of the court below to set it aside, but the appellate court will not disturb the verdict or finding where the evidence is conflicting.<sup>72</sup> The judgment will not be reversed where there appears to have been a substantial conflict of evidence.<sup>73</sup> The rule applies to law and equity cases alike.<sup>74</sup> The same rule applies to the report of commissioners appointed to assess damages and estimate benefits in widening of streets.<sup>75</sup> But the rule does not apply where the evidence in the court below consists of depositions.<sup>76</sup>

§ 5117. **Wrong reasoning.** An order granting a new trial will not be reversed because the reason assigned is a bad one, if there was a good reason for granting it.<sup>77</sup> The order stands upon the facts in the record.<sup>78</sup> If a judgment or order is right, that it could not be sustained upon the theory of law on which the court below proceeded is no reason for reversing it.<sup>79</sup> A

<sup>70</sup> *Baker v. Bicknell*, 14 Wash. St. 29.

<sup>71</sup> *Du Bois v. Perkins*, 21 Oreg. 190; *Nickum v. Gaston*, 24 id. 380.

<sup>72</sup> *Hawkins v. Abbott*, 40 Cal. 639; *Phillpots v. Blasdel*, 8 Nev. 61.

<sup>73</sup> *Crook v. Forsyth*, 30 Cal. 662; *Wilkinson v. Parrott*, 32 id. 102; *McNeill v. Shirley*, 33 id. 202; *Hardenbergh v. Bacon*, 32 id. 356; *Hall v. Bark Emily Banning*, id. 522; *Wendt v. Ross*, id. 650; and see § 4920, *ante*.

<sup>74</sup> *Ritter v. Stock*, 12 Cal. 402; *Doe v. Vallejo*, 29 id. 386.

<sup>75</sup> *Appeal of Piper*, 32 Cal. 530; *Appeal of Brooks and Josephs*, id. 558.

<sup>76</sup> *Wilson v. Cross*, 33 Cal. 51; 91 Am. Dec. 617; but see § 4920, *ante*.

<sup>77</sup> *Bolton v. Stewart*, 29 Cal. 615; *Grant v. Moore*, id. 644; § 5115a, *ante*.

<sup>78</sup> *Ooghill v. Marks*, 29 Cal. 673.

<sup>79</sup> *Munro v. Potter*, 34 Barb. 358; *Gillespie v. Torrance*, 7 Abb. Pr. 462; *Deland v. Richardson*, 4 Den. 95; *Davis v. Spencer*, 24 N. Y. 386; *Scott v. Pilkington*, 15 Abb. Pr. 280; *Mills v. Van Voorhies*, 20 N. Y. 412.



judgment which is right will not be reversed because rendered upon a wrong reason.<sup>80</sup> Where a decision was correct when made, it will not be reversed by reason of any matter of fact not shown or offered in the court below.<sup>81</sup>

§ 5118. **Legal presumptions.** The legal presumption is in favor of the correctness of the findings and decision of the court below, and when attacked on motion for new trial, will be sustained on appeal, unless it be affirmatively shown that they are erroneous. When this is attempted by way of showing that certain specified facts, other than those expressly found by the court, were proved by the evidence, it must likewise appear that such facts would require a different finding or decision from the one rendered, or the specification will be held insufficient.<sup>82</sup> On appeal, the presumption lies that the court below discharged its duty, that its proceedings were regular, and its action founded on proper proof, unless there is something in the record to overcome such presumption.<sup>83</sup> It will be presumed

<sup>80</sup> Helm v. Dumars, 3 Cal. 454; Blevin v. Freer, 10 id. 172; § 5115a, *ante*.

<sup>81</sup> Wallace v. Eldredge (No. 2), 27 Cal. 498.

<sup>82</sup> White v. Abernathy, 3 Cal. 426; Landers v. Bolton, 26 id. 403; Moyes v. Griffith, 35 id. 556; Miles v. Thorne, 38 id. 335; 99 Am. Dec. 384; Herriter v. Porter, 23 Cal. 385; Hastings v. Cunningham, 35 id. 549; Drummond v. Magruder, 9 Cranch, 122; The Potomac, 2 Black, 581; Jasper v. Hazen, 4 N. Dak. 1.

<sup>83</sup> Ford v. Holton, 5 Cal. 321; Owen v. Morton, 24 id. 378; Dimick v. Campbell, 31 id. 238; Sharp v. Daugney, 33 id. 512; Moore v. Massini, 43 id. 389; Wilson v. Dougherty, 45 id. 34; People v. Colson, 49 id. 679; Crane v. Brannan, 3 id. 185; Slyck v. Taylor, 9 Johns. 146; Lamotte v. Archer, 4 E. D. Smith, 46; Beattie v. Qua, 15 Barb. 132; Oakley v. Van Horn, 21 Wend. 305; Darby v. Callaghan, 16 N. Y. 71; Matter of the Empire City Bank, 18 id. 199; Carman v. Pultz, 21 id. 547; Hoyt v. Hoyt, 8 Bosw. 511; Andrews v. Carille, 20 Col. 370. It is incumbent upon the appellant to show error affirmatively. People v. Gibson, 106 Cal. 458; People v. Gillis, 97 id. 542; People v. Douglass, 100 id. 1; People v. Otto, 77 id. 50; City of Helena v. Brule, 15 Mont. 429; Wright v. Ascheim, 4 Utah, 455; § 5104a, *ante*. But when an error against the appellant is shown, injury to him is presumed, and it devolves upon the respondent to show that no injury has in fact been done. Duff v. Duff, 71 Cal. 513; Hausman v. Hausling, 78 id. 283; Thelin v. Stewart, 100 id. 372. Now otherwise in California, under section 475, Code of Civil Procedure, as amended by act of 1897. All intendments should be made in support of the judgment, and all proceedings necessary to its validity will be presumed to have been regularly taken, and

that the record contains all the evidence.<sup>84</sup> A refusal to allow an amendment is presumed to be right unless the character of the proposed amendment is shown in the record.<sup>85</sup> If the instructions to the jury appear in the record, but the evidence or facts do not, the instructions will be presumed to be correct, and warranted by the facts.<sup>86</sup> In the absence of the instructions given to the jury, the presumption is that the law applicable to the facts was correctly stated by the court.<sup>87</sup> Where a decree recited that the entry thereof was consented to by defendants, it will be presumed, when attacked collaterally, that the consent was given in such manner as to give the court jurisdiction of their persons.<sup>88</sup> The presumption is that all the facts in a record bearing on the points decided have received due consideration by the Supreme Court, whether all or a part or none of those facts are mentioned in the opinion.<sup>89</sup> Where there are two presumptions equally reasonable, arising upon the face of the record, the court is bound to adopt that which will maintain the judgment of the court below.<sup>90</sup>

any matters which might have been presented to the court below which would have authorized the judgment will be presumed to have been thus presented, if the record shows nothing to the contrary. *Von Schmidt v. Von Schmidt*, 104 Cal. 547; *Caruthers v. Hensley*, 90 id. 559; *Lee Chuck v. Quan Wo Chong*, 91 id. 592; *Davis v. Lezinsky*, 93 id. 126; *Antonelle v. City Hall Commissioners*, 92 id. 228; *Toulouse v. Burbett*, 2 Idaho, 265; *Montandon v. Walker*, 2 id. 152; *Sheehy v. Shinn*, 103 Cal. 325; *Treat v. Dorman*, 100 id. 623; *O'Callaghan v. Bode*, 84 id. 489. All presumptions on appeal are in favor of the verdict. *Lynn v. South. Pac. Co.*, 103 Cal. 7; *Stanton v. French*, 91 id. 274; § 4704, n., *ante*. Where the record does not affirmatively disclose the fact of nonwaiver of findings, the appellate court will presume, in support of a judgment, that findings were duly waived. *Garr v. Spaulding*, 2 N. Dak. 414; *Haynes v. Roberts*, 4 Utah, 405.

<sup>84</sup> *Orcutt v. Cahill*, 24 N. Y. 578; *Calligan v. Mix*, 12 How. Pr. 495; *Ford v. Holton*, 5 Cal. 322; *Hroch v. Aultman*, 3 S. Dak. 477; and see *Estate of Yoakam*, 103 Cal. 503; *Warner v. Accident Assoc.*, 8 Utah, 431.

<sup>85</sup> *Jessup v. King*, 4 Cal. 331.

<sup>86</sup> *People v. McCauley*, 1 Cal. 386; *People v. Baker*, id. 405; *White v. Abernathy*, 3 id. 426.

<sup>87</sup> *Aldrich v. Palmer*, 24 Cal. 515; *Cattle Co. v. Slaughter*, 6 Utah, 278.

<sup>88</sup> *Thompson v. Connolly*, 42 Cal. 313.

<sup>89</sup> *Mulford v. Estudillo*, 32 Cal. 131.

<sup>90</sup> *Whipley v. Fowler*, 6 Cal. 630.

§ 5119. **Evidence.** Where there has been no objection raised or exceptions taken to insufficiency of the evidence, the court will presume that proper evidence was given.<sup>91</sup> The presumption of law is that there was evidence to sustain every material fact found by the jury;<sup>92</sup> and that facts imperfectly alleged have been proved.<sup>93</sup>

§ 5120. **Practice.** It must be shown that the court erred in striking out the answer; error will not be presumed.<sup>94</sup> When there are both issues of law and fact joined in the same cause, and the cause is tried on the issues of fact, and a judgment rendered, the presumption will be indulged, on appeal, that the issue of law had been first disposed of.<sup>95</sup> Exceptions appearing in the case as settled will be assumed to have been taken in due time and form.<sup>96</sup> Where the record shows that a general demurrer was filed, but is silent as to how it was disposed of, it will be presumed that it was overruled or abandoned.<sup>97</sup> Where the record shows that a charge was given which is not brought into the appellate court for consideration, it will be presumed that the trial court gave all the instructions necessary to assist the jury in arriving at a just and proper verdict.<sup>98</sup> Where no findings appear to have been made upon an issue, it will be presumed that they were in favor of the respondent.<sup>99</sup> When there is nothing in the record and no evi-

<sup>91</sup> *Bunting v. Beldeman*, 1 Cal. 182.

<sup>92</sup> *Doll v. Anderson*, 27 Cal. 248; *Rathbun v. Thurston Co.*, 2 Wash. St. 564; § 4654, *ante*. When the record does not purport to contain all the evidence introduced, the presumption arises that the evidence omitted warranted the judgment. *Irwin v. Locke*, 20 Col. 148; *Live Stock Co. v. Godding*, *id.* 249; *Tanner v. Townsend*, 4 Col. App. 543; *United States v. Groesbeck*, 4 Utah, 487; and see *Woody v. Bennett*, 88 Cal. 241; *Woods v. Courtney*, 16 Oreg. 121; *Schoolfield v. Brunton*, 20 Col. 139. In the absence of the evidence its sufficiency to sustain the findings will be presumed. *Estate of Sharp*, 78 Cal. 483; *Winterburn v. Chambers*, 91 *id.* 170; *Luck v. Luck*, 92 *id.* 653; and see § 4654, *ante*.

<sup>93</sup> *Barron v. Frink*, 30 Cal. 486.

<sup>94</sup> *Dimick v. Campbell*, 31 Cal. 238; *Landers v. Bolton*, 26 *id.* 393; and see *Cleland v. Walbridge*, 78 *id.* 358.

<sup>95</sup> *Brooks v. Douglass*, 32 Cal. 208; *Townsend v. Jemison*, 7 How. (U. S.) 706.

<sup>96</sup> *Hunt v. Bloomer*, 13 N. Y. 341.

<sup>97</sup> *United States v. Alexander*, 2 Idaho, 154.

<sup>98</sup> *Hopkins v. Railway Co.*, 2 Idaho, 277.

<sup>99</sup> *Mining Co. v. First Nat. Bank*, 7 Mont. 530.

dence *aliunde* to show that the court instructed the jury orally instead of in writing, as required by the statute, the presumption is in favor of the court's observance of the law.<sup>100</sup> When no brief is filed by the appellant calling attention to any error in the judgment-roll, the court will presume that there is none.<sup>101</sup> Where the record does not show that any objection was taken by either party to the mode of procedure on the trial, it will be presumed to have been adopted by consent.<sup>102</sup>

§ 5121. **When judgment will be affirmed.** The judgment of the court below will be sustained if there is one conclusive ground upon which it can rest.<sup>103</sup> When a judgment is correct by the record, it will be affirmed without reference to the grounds upon which it was rendered by the court below.<sup>104</sup> It is no objection to an affirmance that judgment can only be sustained on grounds that were not suggested by counsel below.<sup>105</sup> When the Supreme Court is equally divided upon an appeal, the judgment stands affirmed.<sup>106</sup> The Supreme Court will not generally set aside a verdict where the judge and jury harmonize in its support.<sup>107</sup> Where substantial justice has been done, the appellate court will not reverse the judgment on merely technical grounds;<sup>108</sup> or for a mere variance.<sup>109</sup> If the appellant can gain nothing by a new trial, judgment will not be reversed.<sup>110</sup> A judgment will not be reversed for errors that can in no respect injure the appellant.<sup>111</sup> On appeal from judgment on a demur-

<sup>100</sup> *Kent v. Favor*, 3 N. Mex. 218.

<sup>101</sup> *Steuffen v. Jefferis*, 9 Mont. 66. Presumption where respondent fails to argue case. See *Richter v. Irrigation Co.*, 101 Cal. 582.

<sup>102</sup> *Shepherd v. Jones*, 71 Cal. 223.

<sup>103</sup> *Bleven v. Freer*, 10 Cal. 172.

<sup>104</sup> *Kidd v. Teeple*, 22 Cal. 255; *McDonald v. McLeod*, 3 Col. App. 344; *Otis v. Spencer*, 16 N. Y. 610; S. C., 15 How. Pr. 425; S. C., 6 Abb. Pr. 127; *Titus v. Orvis*, 16 N. Y. 617; compare *Improvement Co. v. Stapleton*, 4 N. Mex. 33; *Barry v. Coughlin*, 90 Cal. 220.

<sup>105</sup> *Onelda Bank v. Ontario Bank*, 21 N. Y. 490; *White v. Madison*, 26 id. 117.

<sup>106</sup> *Etting v. United States Bank*, 11 Wheat. 59; *The Antelope*, 10 id. 66; *Washington Bridge Co. v. Stewart*, 3 How. (U. S.) 413; *Luco v. De Toro*, 88 Cal. 26; and see *Frankel v. Deidesheimer*, 93 id. 73.

<sup>107</sup> *Antoine Co. v. Ridge Co.*, 23 Cal. 219.

<sup>108</sup> *Fisher v. Reider*, Hempst. 82.

<sup>109</sup> *Cook v. Gray*, Hempst. 84.

<sup>110</sup> *Larco v. Casaneuava*, 30 Cal. 560.

<sup>111</sup> *Thompson v. Lyon*, 14 Cal. 39; *Mitchell v. Bromberger*, 2 Nev. 345.

rer as frivolous, judgment should be affirmed if the demurrer was bad, though not frivolous.<sup>112</sup> If an appellate court finds that the facts stated in the complaint, with all legal intendments in its favor, will not support the judgment, the judgment must be reversed, though counsel may not have hit on the proper grounds for asking a reversal.<sup>113</sup> Where the questions raised by the record have been repeatedly settled by the appellate court, or are decided by reference to plain elementary principles of law, the judgment will be affirmed, with damages.<sup>114</sup> When a demurrer to a complaint is properly sustained, with leave to amend, and the plaintiff declines to do so, the judgment will not be reversed on appeal, in order to allow the amendment. There must be error in order to allow the reversal of a judgment.<sup>115</sup> This court will not reverse a decision, after a trial on the merits, for defects in the declaration which were amendable in the court below.<sup>116</sup>

When the case made by plaintiff's proof differs from the averments of the complaint, and defendant does not object to the introduction of evidence on this ground, the court will not reverse the judgment on account of the variance.<sup>117</sup> An order of the court below, granting a new trial, will not be disturbed where the statement contains only an outline of the evidence, without any rulings or instructions of the court, and not purporting to give all the evidence, and that given not being clearly in favor of the verdict, the appellate court will not interfere.<sup>118</sup> Where there are no assignments of errors by the appellant, judgment will be affirmed. Affirmative error must be shown.<sup>119</sup> On an appeal from an order made after final judgment, directing the receiver to pay over to the prevailing party money in his hands, the Supreme Court can not reverse the

<sup>112</sup> *Witherhead v. Allen*, 28 Barb. 681; *Wesley v. Bennett*, 5 Abb. Pr. 498; *Martin v. Kanouse*, 2 id. 327; *Laverty v. Griswold*, 12 N. Y. Leg. Obs. 316; *Manning v. Tyler*, 21 N. Y. 570.

<sup>113</sup> *Van Doren v. Tjader*, 1 Nev. 380.

<sup>114</sup> *Pinkham v. Wemple*, 12 Cal. 449; *Field v. Campbell*, 17 La. Ann. 30.

<sup>115</sup> *Sutter v. San Francisco*, 36 Cal. 112.

<sup>116</sup> *Shoenberger's Ex'rs v. Zook*, 34 Penn. St. 24.

<sup>117</sup> *Marshall v. Ferguson*, 23 Cal. 66.

<sup>118</sup> *Loucks v. Edmondson*, 18 Cal. 203.

<sup>119</sup> *People v. Goldburg*, 10 Cal. 312; *Raymond v. Spicer*, 6 Dak. 45; *Adams v. Bankers' L. Assoc.*, 13 Mont. 222; *Leete v. Sutherland*, 20 Nev. 70; *Dold v. Robertson*, 3 N. Mex. 313; *People v. Levison*, 16 id. 98; 76 Am. Dec. 505.

order appointing the receiver.<sup>120</sup> A judgment will not be reversed because of an error which affects the rights of parties who have not appealed, and not those of the appellants. This court will not reverse a judgment dismissing an action for want of prosecution, unless there has been an abuse of discretion in the court below in giving the judgment; and it devolves on the appellant to show such abuse of discretion.<sup>121</sup> In Pennsylvania, it has been held that a judgment will not be reversed because the court below erred in prescribing the order in which counsel should address the jury.<sup>122</sup> Where the findings do not contain all the facts necessary to be proved in order to entitle the prevailing party to a judgment, it will not be reversed, unless the court below has, after defect has been pointed out, failed or refused to make the required finding, and exception has been taken thereto.<sup>123</sup> If the facts in issue are not found, and the evidence is not set out in the transcript, the appellate court will not undertake to say that it was proved. Evidence tending to prove a fact does not necessarily amount to proof of the fact.<sup>124</sup> Where the findings support the judgment, and the record discloses no exceptions to admission of evidence or the rulings of the court, the judgment will be affirmed.<sup>125</sup> A judgment will not be reversed on the findings alone, unless they show affirmatively that the judgment could not properly have been rendered.<sup>126</sup> A judgment on the report of referee will not be reversed for failure to find on issues, where no evidence would warrant findings in favor of the appellant.<sup>127</sup>

<sup>120</sup> *Whitney v. Buckman*, 26 Cal. 451.

<sup>121</sup> *Grigsby v. Napa County*, 36 Cal. 585; 95 Am. Dec. 213.

<sup>122</sup> *Smith v. Frazier*, 53 Penn. St. 226.

<sup>123</sup> *Lyon v. Leimback*, 29 Cal. 139; but see *Dowd v. Clark*, 51 id. 262.

<sup>124</sup> *Merrill v. Chapman*, 34 Cal. 251.

<sup>125</sup> *Hutchinson v. Ryan*, 11 Cal. 142; *Clark v. Huber*, 20 id. 196; and see, to same effect, *Cooper v. Kellogg*, 2 Idaho, 304; *McGuire v. Lamb*, id. 346; *Fisk v. Patton*, 7 Utah, 410; *Dorris v. Sullivan*, 89 Cal. 62; *Jackson v. Brown*, 82 id. 275; *Moore v. Moody*, 88 id. 273; *Peck v. Rees*, 7 Utah, 475; *Eastman v. Cook*, 90 Cal. 238.

<sup>126</sup> *Semple v. Cook*, 50 Cal. 26.

<sup>127</sup> *Alger v. Raymond*, 7 Bosw. 418. The findings of a referee will rarely be disturbed on appeal when there are circumstances tending to weaken the testimony of the defeated party, or to sustain the findings as made. *Lovejoy v. Chapman*, 23 Oreg. 571; *Bruce v. Insurance Co.*, 24 id. 486. Where the only question involved is one

§ 5122. **Modification of judgment.** Where the judgment below is erroneous, the appellate court will so modify it as finally to settle the controversy, where the rights of the parties appear from the record to be fully ascertained.<sup>128</sup> A judgment will be modified and affirmed where there is an error which the record enables the appellate court fully to correct.<sup>129</sup> Where, in ejectment against several defendants, the judgment for damages is several instead of joint, the damages may be remitted, and the judgment for the land may stand.<sup>130</sup> Respondent may remit damages, and pay costs of appeal;<sup>131</sup> or the excess of damages over amount claimed may be remitted, and the judgment stand.<sup>132</sup> The judgment of a court can only be changed on a petition for rehearing or a modification.<sup>133</sup> The court may direct that judgment be affirmed on respondent's remitting that

of fact, and the evidence, though conflicting, supports the referee's report, the decree will be affirmed. *Hummel v. Friese*, 24 Oreg. 586; *Guchtel v. Bode*, id. 587; and see *Machine Co. v. Mining Co.*, 6 Utah, 351; *Maxfield v. West*, id. 379. A verdict will not be disturbed if the evidence is sufficient to support it. *Brasen v. Railway Co.*, 4 Wash. St. 754; *Dillon v. Folsom*, 5 id. 439; and see *Toponce v. Stock Co.*, 6 Utah, 439; § 4704, *ante*. The judgment or order appealed from will be affirmed without an examination of the record, if the appellant neglects to file any brief. *Drexler v. Tobacco Co.*, 78 Cal. 624; *Faris v. Lampson*, 73 id. 191; *Tucker v. Constable*, 16 Oreg. 239; *State v. McGinnis*, 17 id. 332; *Mathewson v. Boyle*, 20 Nev. 88; and see *Gavin v. Gavin*, 92 Cal. 292. If an appeal is taken for delay the judgment will be affirmed with damages. *Gleske v. Anderson*, 77 Cal. 247. Cross-appeals, affirmance of one without affecting the other. *State v. Railroad Co.*, 21 Nev. 172. A judgment may be affirmed in part and reversed in part. *Fitch v. Hammer*, 17 Col. 591. Denial of appellee's motion for affirmance. See *Wheeler v. Flick*, 4 N. Mex. 149. Excessive damages, verdict not disturbed. See *Naylor v. Salt Lake City*, 9 Utah, 491. Motion to affirm judgment must be on notice to opposite party. *McCarty v. Wintler*, 17 Oreg. 391.

<sup>128</sup> *Persse v. Cole*, 1 Cal. 369; *Gahan v. Neville*, 2 id. 81; *Bidleman v. Kewan*, id. 249; *Williams v. Santa Clara, etc., Co.*, 66 id. 193.

<sup>129</sup> *Union Water Co. v. Murphy's Flat Fluming Co.*, 22 Cal. 621; *Ivenson v. Caldwell*, 3 Wyo. 465; *Rio Grande, etc., R. R. Co. v. Deasey*, 3 Col. App. 196.

<sup>130</sup> *Curtis v. Herrick*, 14 Cal. 117; 73 Am. Dec. 632.

<sup>131</sup> *Doll v. Feller*, 16 Cal. 432; *La Motte v. Archer*, 4 E. D. Smith, 46.

<sup>132</sup> *Pierce v. Payne*, 14 Cal. 419; *Behlow v. Shorb*, 91 id. 141; *Herman v. Paris*, 81 id. 625.

<sup>133</sup> *Houston v. Williams*, 13 Cal. 24; 73 Am. Dec. 565.



part of it which is erroneous, if capable of exact calculation.<sup>134</sup> Where there is a discrepancy between the findings of fact and the judgment, the appellate court will order the proper modification of the judgment.<sup>135</sup> The appellate court, in reversing a judgment and directing the entry of a judgment in the court below, does not order a new trial.<sup>136</sup> When the appellate court directs the court below what judgment to render, instead of directing it to modify its judgment, it is a reversal of the judgment of the court below.<sup>137</sup> A judgment can not be affirmed as to part of the amount recovered, and reversed as to the residue, as between the same parties, where a new trial is granted as to the part reversed.<sup>138</sup>

Where an appeal is only from an order denying a new trial, the appellate court may go back to the complaint and strike out one or more causes of action, and may modify the judgment.<sup>139</sup> In an action for the recovery of chattels the Supreme Court should modify the judgment by making it in the alternative for the return of the property or for its value.<sup>140</sup> Where the judgment is in harmony with the pleadings and findings of fact, but erroneous by reason of a variance between the findings and proof, the judgment will not be modified to suit the proof.<sup>141</sup> Where only one of several defendants against whom a judgment had been rendered appeals, the appellate court, if it reverses the judgment, may reverse or modify it as to any or all the par-

<sup>134</sup> *Boyd v. Foot*, 5 Bosw. 110; *McAuley v. Mildrum*, 9 Abb. Pr. 198; *Corning v. Corning*, 6 N. Y. 97; *Moffett v. Sackett*, 18 Id. 522; *Markell v. Matthews*, 3 Col. App. 49; *O'Shea v. Kirker*, 4 Bosw. 120; 8 Abb. Pr. 69; see § 5121, *ante*. Case where the Supreme Court refused to modify its judgment of reversal, though an offer to remit the damages was made. *Ellis v. Jeans*, 26 Cal. 272. Case remanded, with directions to add to the judgment the yearly rent of the land as found by the jury. *Bay v. Pope*, 18 Cal. 694. Judgment may be modified by deducting the interest which was improperly included, and, as modified, affirmed. *Pettit v. Thalheimer*, 3 Col. App. 355. But when part of the recovery is erroneous and it can not be definitely ascertained what part could be legitimately sustained, the judgment can not be modified and permitted to stand, but must be reversed. *Eaton v. Reservoir Co.*, 3 Col. App. 366.

<sup>135</sup> *Clark v. Huber*, 20 Cal. 196.

<sup>136</sup> *Argenti v. San Francisco*, 30 Cal. 458.

<sup>137</sup> *Id.*

<sup>138</sup> *Story v. New York & Harlem R. R. Co.*, 6 N. Y. 85.

<sup>139</sup> *Argenti v. San Francisco*, 30 Cal. 458.

<sup>140</sup> *Fitzhugh v. Wiman*, 9 N. Y. 559; *O'Shea v. Kirker*, 4 Bosw. 120.

<sup>141</sup> *Clark v. Huber*, 20 Cal. 196.



ties defendant. But where, in such case, the error assigned only affects the party appealing, the court will not presume error as to the parties not appealing, and will not reverse the judgment as to them;<sup>142</sup> or a judgment may be reversed as to part of the amount, and affirmed as to the rest;<sup>143</sup> and costs will be awarded in favor of the one as to whom judgment was reversed.<sup>144</sup> The law regards the substance more than the form, and the appellate court will compel the court below to issue an attachment to punish a contempt which is in substance a private right, though in form a case of contempt.<sup>145</sup> If the judgment is erroneous, and the findings of fact will enable the Supreme Court to determine what kind of a judgment should have been rendered, it will direct the court below to render the proper judgment.<sup>146</sup>

<sup>142</sup> *Minturn v. Bayles*, 33 Cal. 129; *Ricketson v. Richardson*, 26 id. 149; consult also, *Montgomery Bank v. Albany Bank*, 7 N. Y. 459; *Giraud v. Beach*, 4 E. D. Smith, 27; *Williams v. Christie*, 4 Duer, 29; *Fields v. Moul*, 15 Abb. Pr. 6.

<sup>143</sup> *Brownell v. Winnie*, 29 N. Y. 400; 86 Am. Dec. 314; *Staats v. Hudson River R. R. Co.*, 39 Barb. 298; *Pinkney v. Keyler*, 4 E. D. Smith, 469; *Rosenbaum v. Gunter*, 3 id. 203; *Fitch v. Hammer*, 17 Col. 591; *Fields v. Moul*, 15 Abb. Pr. 6; overruling *Kasson v. Mills*, 8 How. Pr. 377. Even when for entire damages. *Decker v. Hassel*, 26 How. Pr. 528; *Fields v. Moul*, 15 Abb. Pr. 6.

<sup>144</sup> *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459.

<sup>145</sup> *Merced County v. Fremont*, 7 Cal. 130.

<sup>146</sup> *Love v. Shartzer*, 31 Cal. 488. See as to awarding proper judgment, or modifying judgment when all the facts are before the court, *Gage v. Brewster*, 31 N. Y. 218; *McDougall v. Cooper*, id. 498; *People v. Supervisors of Richmond*, 28 id. 112; *Beach v. Cook*, id. 508; 86 Am. Dec. 260; *Brownell v. Winnie*, 29 N. Y. 400; 86 Am. Dec. 314; 29 How. Pr. 193; *In re Livingston's Petition*, 34 N. Y. 555; S. C., 32 How. Pr. 20; S. C., 2 Abb. Pr. 1; *Wagner v. Law*, 3 Wash. St. 500; *Reynolds v. Reynolds*, 67 Cal. 176; *Cushman v. Ditch Co.*, 3 Col. App. 437; *State v. Superior Court*, 8 Wash. St. 591. Modification of judgment to conform to special verdict. *Kullman v. Greenbaum*, 84 Cal. 98; modification of void judgment. *Bell v. Wandby*, 7 Wash. St. 203; modification of, in action of claim and delivery. *Meads v. Lasar*, 93 Cal. 530; modification of decree. *Irrigation Co. v. Stock Co.*, 7 Utah, 456. After the time fixed by law, or well-established practice, a judgment which is neither void on its face, nor affected by fraud in its procurement nor want of jurisdiction, stands for absolute verity, and neither the court which rendered, nor the appellate court which has affirmed it, has jurisdiction to vacate, modify or otherwise affect it. *Wolferman v. Bell*, 8 Wash. St. 140. Nor will the appellate court modify a judgment upon appeal, where, in order to do so, it must make a finding different from

§ 5123. **Reversal of judgment.** On an appeal from a judgment, if an error has been committed which may by possibility have prejudiced appellant, judgment must be reversed.<sup>147</sup> A judgment against clear, uncontradicted, and unimpeached evidence must be reversed.<sup>148</sup> But the uncontradicted evidence of an interested witness, as a party in the suit, may be disregarded.<sup>149</sup> And where judgment was for the defendant, if error is disclosed in the admission of improper testimony in defendant's favor, the judgment will be reversed, and a new trial ordered, without considering whether or not the plaintiff proved a case entitling him to relief.<sup>150</sup> Where the evidence is conflicting, the Supreme Court will not reverse the order of the court below denying a new trial.<sup>151</sup> If erroneous or illegal evidence is admitted, and the record does not negative the presumption that injury was sustained thereby, the judgment will be reversed;<sup>152</sup> though the defendant did not appear on the trial;<sup>153</sup> and so, where judgment was entirely unsupported by evidence;<sup>154</sup> or if competent evidence was excluded which might

that made by the court below, but will reverse the judgment and remand the cause for a new trial. *Posachane Water Co. v. Standart*, 97 Cal. 476.

<sup>147</sup> *Brown v. Richardson*, 20 N. Y. 472; *Erben v. Lorillard*, 19 id. 299; *Williams v. Fitch*, 18 id. 546; *Underhill v. New York & Harlem R. R. Co.*, 21 Barb. 489; *Worrall v. Parmelee*, 1 N. Y. 519; 49 Am. Dec. 350; *Weber v. Kingsland*, 8 Bosw. 415; *Hahn v. Van Doren*, 1 E. D. Smith, 411; *Clark v. Vorce*, 19 Wend. 232; *Farmers & Manufacturers' Bank v. Whinfield*, 24 id. 419; *Gillet v. Mead*, 7 id. 193; *Clark v. Dutcher*, 9 Cow. 674.

<sup>148</sup> *Evans v. Wood*, 15 Abb. Pr. 416; *Armstrong v. Smith*, 44 Barb. 120; *Jacks v. Darrin*, 3 E. D. Smith, 557; *Goldsmith v. Obermeler*, id. 121; *Conlan v. Latting*, id. 354; *Orcutt v. Cahill*, 24 N. Y. 578; *Fox v. Decker*, 3 E. D. Smith, 150.

<sup>149</sup> *Roberts v. Gee*, 15 Barb. 449.

<sup>150</sup> *Reddington v. Waldon*, 22 Cal. 185.

<sup>151</sup> *Preston v. Keys*, 23 Cal. 194; *Lane v. Brown*, 22 Ind. 239; and see *Amter v. Conlon*, 3 Col. App. 155; *Polk v. Mook*, 10 Col. 326; *Miller v. Thorpe*, 4 Col. App. 459.

<sup>152</sup> *Roff v. Duane*, 27 Cal. 565; *Lalley v. Wise*, 28 id. 539; *Worrall v. Parmelee*, 1 N. Y. 519; *Marquand v. Webb*, 16 Johns. 89; *Osgood v. Manhattan Co.*, 3 Cow. 612; *Tappan v. Butler*, 7 Bosw. 480; *Main v. Eagle*, 1 E. D. Smith, 621; *Hahn v. Van Doren*, id. 411; *Belden v. Nicolay*, 4 id. 14.

<sup>153</sup> *Squier v. Gould*, 14 Wend. 159; *Finch v. McDowell*, 7 Cow 537; *McNutt v. Johnson*, 7 Johns. 18; *Lynch v. McBeth*, 7 How. Pr. 113.

<sup>154</sup> *Davidson v. Hutchins*, 1 Hilt. 123; *Storp v. Harbutt*, 4 E. D. Smith, 464; *Hunt v. Westervelt*, id. 225; *Calligan v. Mix*, 12 How.

possibly have changed the result.<sup>155</sup> The Supreme Court will reverse the judgment of the court below where the facts found by the court are not sufficient to support the judgment.<sup>156</sup> If a judgment was rendered before the Code of Civil Procedure took effect, and there was no finding of facts or agreed statement of facts, the Supreme Court, on reversing the judgment, will not direct judgment to be entered in favor of the losing party.<sup>157</sup> For error in refusing to give instructions to the jury the judgment will be reversed;<sup>158</sup> or for any error in a charge which have might misled the jury;<sup>159</sup> or for error in charge of judge;<sup>160</sup> or for refusal to charge on a proper request.<sup>161</sup> A judgment rendered by the District Court after the time appointed by law for its adjournment will be reversed.<sup>162</sup> Even though a judgment appears to be correct on the merits, it will be reversed for a mistrial.<sup>163</sup> An order of the court below setting aside a judgment, where it does not appear that a copy of the order to show cause why the judgment should not be set aside was served on plaintiff or his attorney, will be reversed on appeal.<sup>164</sup> A

Pr. 495; *Howard v. Brown*, 2 E. D. Smith, 247; *Wiley v. Slater*, 22 Barb. 506; *Fish v. Skut*, 21 id. 333; *Rathbone v. Stanton*, 6 id. 141; see, also, *Bugh v. Rominger*, 15 Col. 452; *Wachamuth v. Heil*, 1 Col. App. 196; *Cross v. Kistler*, 14 Col. 571; *Wise v. Williams*, 88 Cal. 30; *Ede v. Knight*, 93 id. 159; *Smith v. Belshaw*, 89 id. 427; *Chicago Investment Co. v. Harrison*, 1 Col. App. 466; *Denver, etc., R. R. Co. v. Morton*, 3 id. 155; *Abbott v. Smith*, id. 264; *Freedman v. Gordon*, 4 id. 342.

<sup>155</sup> *McAllister v. Sexton*, 4 E. D. Smith, 41; *Raymond v. Richardson*, id. 171; *Tuttle v. Hunt*, 2 Cow. 436; *Irvine v. Cook*, 15 Johns. 239; *Penfield v. Carpenter*, 13 id. 350; *Haswell v. Bussing*, 10 id. 128; *Martin v. Garrett*, 4 E. D. Smith, 346. The admission of improper testimony will not necessarily cause the reversal of a judgment supported by sufficient competent evidence. *Welch v. Mayer*, 4 Col. App. 440; and see *Insurance Co. v. Friedenthal*, 1 id. 5.

<sup>156</sup> *Davis v. Caldwell*, 12 Cal. 125.

<sup>157</sup> *The Cen. P. R. R. Co. v. Robinson*, 49 Cal. 446.

<sup>158</sup> *Busenius v. Coffee*, 14 Cal. 91; *De Benedetti v. Mauchin*, 1 Hilt. 213.

<sup>159</sup> *Pettit v. Ide*, 12 Abb. Pr. 44.

<sup>160</sup> *Whitney v. Wells*, 28 How. Pr. 150; *Pettit v. Ide*, 12 Abb. Pr. 44.

<sup>161</sup> *De Benedetti v. Mauchin*, 1 Hilt. 213; *Halloran v. N. Y. & Erie R. R. Co.*, 2 E. D. Smith, 257.

<sup>162</sup> *Smith v. Chichester*, 1 Cal. 409.

<sup>163</sup> *Cobb v. Cornish*, 6 Abb. Pr. 129; *S. C.*, 16 N. Y. 602; *Gilbert v. Beach*, id. 606; *Purchase v. Mattison*, 15 Abb. Pr. 402.

<sup>164</sup> *Vallejo v. Green*, 16 Cal. 160.

judgment by default will be reversed, unless the record show service on the defendant or appearance.<sup>165</sup> If the plaintiff admits in the pleadings that he never had a cause of action, the Supreme Court will reverse the judgment, and either order a judgment in defendant's favor or remand the cause for further proceedings.<sup>166</sup> Where the complaint fails to state facts sufficient to constitute a cause of action, judgment by default thereon will be reversed on appeal.<sup>167</sup> The judgment of a court on a second trial, an appeal from the first trial being taken and perfected, will be reversed, because the court could not proceed with the second trial until the appeal from the order was determined.<sup>168</sup> If a company is sued by a wrong name, but answers by its true name, and judgment is rendered against it by its true name, the judgment is not void, and the Supreme Court on appeal, in affirming the judgment, will direct the court below to substitute the true name in the complaint.<sup>169</sup>

§ 5123a. *The same — continued.* It is not error, simply, but error legally excepted to, that constitutes ground for reversal.<sup>170</sup> Immaterial or nonprejudicial error is not ground for reversal.<sup>171</sup> The admission of testimony that has no bearing upon the issues as made by the pleadings, but which, from its nature, would tend to prejudice the jury against the party objecting, constitutes reversible error.<sup>172</sup> But when errors in the admission

<sup>165</sup> *Schloss v. White*, 16 Cal. 65; *Burt v. Scrantom*, 1 id. 416; *Joyce v. Joyce*, 5 id. 449.

<sup>166</sup> *Mulford v. Estudillo*, 32 Cal. 131; *Barron v. Frink*, 30 id. 486.

<sup>167</sup> *Hallock v. Jaudin*, 34 Cal. 167.

<sup>168</sup> *Ford v. Thompson*, 19 Cal. 119.

<sup>169</sup> *Mahon v. San Rafael T. R. Co.*, 49 Cal. 270.

<sup>170</sup> *Kearney v. Snodgrass*, 12 Oreg. 311; and see *City of Durango v. Luttrell*, 18 Col. 123.

<sup>171</sup> *Schoolfield v. Houle*, 13 Col. 394; *Wray v. Carpenter*, 16 id. 271; *Mining Co. v. Isaacs*, 18 id. 400; *Salazar v. Taylor*, 18 id. 538; *Zumwalt v. Dickey*, 92 Cal. 156; *Chapell v. Schmidt*, 104 id. 511; *Alexander v. Mill Co.*, 104 id. 532.

<sup>172</sup> *McMillen v. Altchison*, 3 N. Dak. 183; *Bank v. Carson*, 30 Neb. 104; *Jones v. Bacon*, 19 N. Y. Supp. 553; and see, also, as to what constitutes prejudicial or reversible error, *Slattery v. Donnelly*, 1 N. Y. Supp. 264; *Taylor v. Rice*, id. 72; *Johnson v. Railroad Co.*, id. 354; *Comaskey v. Railroad Co.*, 3 id. 276; *Hutchinson v. Cleary*, id. 270; *Smith v. Railroad Co.*, id. 555. Where the error consists in the infraction of a constitutional guaranty in favor of personal liberty, the law will presume an injury, and adjudge accordingly. *State v. Lurch*, 12 Oreg. 99; see § 5118, *ante*.

or rejection of testimony could in no way have affected the result, they are not grounds for reversal.<sup>173</sup> If the trial court excludes evidence which ought to have influenced its judgment, it is error which can not be disregarded as harmless.<sup>174</sup> The giving of an erroneous instruction can not be assigned as error, unless it was prejudicial to the party complaining.<sup>175</sup> And it is held that a judgment will not be reversed because of error in the form of instructions.<sup>176</sup> So, generally, mere irregularities, resulting in no harm to the appellant, do not warrant a reversal.<sup>177</sup> Mere doubt upon the whole testimony as to the correctness of a decree is not sufficient ground for reversal.<sup>178</sup> A judgment which is right upon the merits should not be reversed by reason of the fact that the court gave a wrong reason for its rendition.<sup>179</sup> But a judgment which is wrong upon any hypothesis must be reversed.<sup>180</sup> And where a cause has been submitted to a jury upon two distinct theories, one of which is erroneous, and it is impossible to determine upon which theory the jury acted, the judgment must be reversed.<sup>181</sup> So, a judgment based upon constructive service alone, though rendered after jurisdiction is acquired, may nevertheless be reversed for error if rendered before the legal time for answering expired.<sup>182</sup> So, a judgment shown by the record to be void will be reversed on appeal, though neither party raises the question.<sup>183</sup> And where there is no brief on file by the respondent, and the case is not orally argued in his brief, the judgment and order appealed from should be reversed.<sup>184</sup>

<sup>173</sup> *Haugen v. Railway Co.*, 3 S. Dak. 394; and see *Krewson v. Purdom*, 15 Oreg. 589; *Hammond v. Bovee*, 4 Col. App. 269.

<sup>174</sup> *Wilson v. Morris*, 4 Col. App. 242.

<sup>175</sup> *Fugate v. Smith*, 4 Col. App. 201; *Buckey v. Phenicle*, 4 id. 204.

<sup>176</sup> *Perkins v. Marrs*, 15 Col. 262.

<sup>177</sup> *Putnam v. Lyon*, 3 Col. App. 144.

<sup>178</sup> *Lindsay v. Lindsay*, 1 Col. App. 108.

<sup>179</sup> *Groome v. Almstead*, 101 Cal. 425; *Home Ins. Co. v. Railroad Co.*, 19 Col. 46; *Bell v. Cunningham*, 81 N. Y. 83.

<sup>180</sup> *Robeson v. Miller*, 4 Col. App. 313.

<sup>181</sup> *King v. Post*, 12 Col. 355.

<sup>182</sup> *Seeley v. Taylor*, 17 Col. 70.

<sup>183</sup> *Miller v. Sunde*, 1 N. Dak. 1; *Robinson v. Navigation Co.*, 112 N. Y. 315; and see *Stewart v. Lohr*, 1 Wash. St. 341; § 5123, *ante*; *Pioneer Land Co. v. Maddux*, 109 Cal. 633.

<sup>184</sup> *Kelly v. Bradbury*, 104 Cal. 237; *Davis v. Hart*, 103 id. 530; *Richter v. Fresno, etc., Co.*, 101 id. 582.

§ 5124. **Reversal, effect of.** If the judgment is reversed, the parties are remitted to their original rights, and may proceed as though no action had ever been brought.<sup>185</sup> The reversal of a judgment restores any advantage which may have been derived from its rendition.<sup>186</sup> Property purchased by the plaintiff on sale under judgment reversed must be restored;<sup>187</sup> but otherwise as to a stranger, a *bona fide* purchaser without notice.<sup>188</sup> The assignee of a judgment, and of the sheriff's certificate of sale thereunder, stands in the same position as his assignor.<sup>189</sup>

§ 5125. **When judgment will be reversed and new trial ordered.** A new trial must be ordered whenever it is necessary as a matter of right.<sup>190</sup> So where there are disputed facts to be decided;<sup>191</sup> or where the evidence was opposed to the verdict;<sup>192</sup> or where erroneous instructions have been given;<sup>193</sup> but not where it is apparent that no possible state of proof applicable to the issues can entitle respondent to a judgment.<sup>194</sup> On reversing a case, the appellate court may in its discretion award a new trial.<sup>195</sup> Where nothing appears on the record, either in the pleadings, evidences, or judgment, from which the court can ascertain the rights of the parties, and where it is highly probable that the judgment of the court below is founded neither upon law nor equity, the case may be remanded for new trial.<sup>196</sup> On review of error on the trial, in the process of ascer-

<sup>185</sup> *Hunt v. Hoboken Land Co.*, 1 Hilt. 161; *Ellert v. Kelly*, 4 E. D. Smith, 12; S. C., 10 How. Pr. 392. See, as to rights of appellant upon reversal of judgment, *Hewitt v. Dean*, 91 Cal. 617; Cal. Code Civ. Pro., § 957.

<sup>186</sup> *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459; *Estus v. Baldwin*, 9 How. Pr. 80; *Sheridan v. Mann*, 5 id. 201.

<sup>187</sup> *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Griffin v. Marquardt*, 17 N. Y. 28.

<sup>191</sup> *Lick v. Diaz*, 37 Cal. 437; *Polhemus v. Carpenter*, 42 id. 375.

<sup>192</sup> *Maine Boys T. Co. v. Boston T. Co.*, 37 Cal. 40.

<sup>193</sup> *Slaughter v. Fowler*, 44 Cal. 195; *McCreery v. Everding*, id. 246; see §§ , *ante*.

<sup>194</sup> *Edmonston v. McLoud*, 16 N. Y. 543; *Marquat v. Marquat*, 12 id. 336.

<sup>195</sup> *Griffin v. Marquardt*, 17 N. Y. 28; *Astor v. L'Amoureux*, 8 id. 107; *Marquat v. Marquat*, 12 id. 336; *Moffet v. Sackett*, 18 id. 522; *Schenck v. Dart*, 22 id. 420; see § 4901, *ante*.

<sup>196</sup> *Reed v. Jourdain*, 1 Cal. 101.

taining the facts, the proper judgment on reversal will be one ordering a new trial.<sup>197</sup> Where proper, an absolute reversal may be ordered as to some and a new trial awarded as to others of the appellants.<sup>198</sup> The appellate court may add to the judgment of reversal that the cause be tried *de novo*, or that a particular issue be tried.<sup>199</sup> The court below may be allowed to enter judgment for plaintiff for the amount of the verdict, or otherwise to retry the cause.<sup>200</sup> An order for a new trial is not "equivalent to a new action."<sup>201</sup> Where judgment is reversed and a new trial granted, the case goes back for trial on all the issues of fact raised by the pleadings,<sup>202</sup> the parties having the same right which they originally had.<sup>203</sup> But a new trial will not be awarded for an error by which the rights of the party were not prejudiced,<sup>204</sup> nor where it is clearly seen that after perhaps a protracted litigation the result must be the same.<sup>205</sup>

§ 5126. **Defective pleading.** Where on appeal the complaint is so radically defective as not to authorize the judgment, a new

<sup>197</sup> *Marquat v. Marquat*, 12 N. Y. 336; *Astor v. L'Amoureux*, 8 id. 107; *Edmonston v. McLoud*, 16 id. 543; *Griffin v. Marquardt*, 17 id. 28; *Meyer v. City of Louisville*, 26 Barb. 609; *Cobb v. Cornish*, 16 N. Y. 602; *Irwin v. Lawrence*, 1 Hilt. 352; *Moffet v. Sackett*, 18 N. Y. 522. An unqualified reversal of a judgment by the Supreme Court has the effect to remand the cause for a new trial. *Falkner v. Hendy*, 107 Cal. 49. Reversal and new trial where the verdict is against evidence. See *Helfrich v. Railway Co.*, 7 Utah, 186. Under Washington Code, § 450 (1881), the Supreme Court may review and reverse on appeal any judgment of the Superior Court, although no motion for a new trial was made in such court. *Johnson v. Maxwell*, 2 Wash. St. 482. Reversal of order refusing new trial. See *United States v. Brown*, 6 Utah, 115; § 4967, *ante*. Dismissal of action on reversal of judgment. See *Bernhard v. Reeves*, 6 Wash. St. 424. Remand of cause on reversal for correction of error. *Ohio Creek Coal Co. v. Hinds*, 15 Col. 173.

<sup>198</sup> *Williams v. Christie*, 4 Duer, 29.

<sup>199</sup> *Argenti v. San Francisco*, 30 Cal. 458.

<sup>200</sup> *Reniff v. The Cynthia*, 18 Cal. 669.

<sup>201</sup> *United States v. Hawkins*, 1 Pet. 125.

<sup>202</sup> *Hidden v. Jordan*, 28 Cal. 301.

<sup>203</sup> *Stearns v. Aguirre*, 7 Cal. 443; *Argenti v. San Francisco*, 30 id. 458; *Phelan v. San Francisco*, 9 id. 15.

<sup>204</sup> *Kilburn v. Ritchie*, 2 Cal. 148; *Tyler v. Green*, 28 id. 406; 87 Am. Dec. 130; *Carpentier v. Gardiner*, 29 Cal. 160.

<sup>205</sup> *Tohler v. Folsom*, 1 Cal. 213; *Sunol v. Hepburn*, id. 285; *Smith v. Compton*, 6 id. 26; § 5123, *ante*.



trial may be granted, with leave to plaintiff to amend.<sup>206</sup> Case where Supreme Court, after reversing judgment by default, some of the items of the complaint being illegal, remanded the cause, with liberty to the defendant to set up defense.<sup>207</sup>

§ 5127. **Findings.** Where the findings of the court are clearly not warranted by the evidence, a new trial should be granted.<sup>208</sup> Where the testimony is all one way, and the finding is contrary to the evidence, a new trial will be granted;<sup>209</sup> or if the evidence was such that if the question had been submitted to a jury the court would set aside the verdict as contrary to the evidence.<sup>210</sup> A court has power to set aside the report of a referee and grant a new trial, on the ground that the evidence was insufficient to justify his decision.<sup>211</sup>

§ 5128. **In injunction.** In a case of injunction and damages, where the injunction, but not the damages, was allowed, and both parties appeal, the one from the injunction and the other from the order refusing damages, the court will remand the cause for trial *de novo*, on the question of damages.<sup>212</sup>

§ 5129. **Newly-discovered evidence.** Where the record does not contain the evidence given on the trial, the Supreme Court will not hold the refusal of a new trial on account of newly-discovered evidence to be error, as it can not know how far the new evidence is merely cumulative.<sup>213</sup>

<sup>206</sup> *Sterling v. Hanson*, 1 Cal. 479.

<sup>207</sup> *People v. Hager*, 19 Cal. 462.

<sup>208</sup> *Bolton v. Stewart*, 29 Cal. 615; see, also, *Buttz v. Colton*, 6 Dak. 306; *Bowman v. Ayers*, 2 Idaho, 282; *Beamer v. Freeman*, 84 Cal. 554; *Oakland Pav. Co. v. Bagge*, 79 id. 439.

<sup>209</sup> *Lyle v. Rollins*, 25 Cal. 440.

<sup>210</sup> *Moore v. Murdock*, 26 Cal. 514. A finding of the lower court will not be reversed on appeal unless there is a substantial failure of proof to support it. *Washington, etc., Plaster Co. v. Johnson*, 10 Wash. St. 445; and see *Charles v. Varian*, 4 Col. App. 227. If the questions presented for review are only those of fact, and there is evidence to support the finding, the judgment will not be disturbed. *McKenzie v. Paint, etc., Co.*, 4 Col. App. 156. When failure merely to make findings on certain issues is not ground for reversal. See *Dedman v. Moffitt*, 89 Cal. 211.

<sup>211</sup> *Cappe v. Brizzolara*, 19 Cal. 607.

<sup>212</sup> *Jungerman v. Bovee*, 19 Cal. 355.

<sup>213</sup> *Cowden v. Wade*, 23 Ind. 471; and see § 4887, *ante*.



§ 5130. **State of excitement.** Where it is manifest that the verdict was given under a state of great excitement, and the court below had refused a new trial, the appellate court will reverse the judgment and order a new trial.<sup>214</sup>

§ 5131. **Uncertainty of law.** Where the merits of the case were not investigated in the lower court, by reason of an uncertainty as to the proper mode of proceeding under the anomalous provisions of the Practice Act in regard to interventions, a new trial was granted.<sup>215</sup>

§ 5132. **Wrong construction.** Where the complaint, evidence as admitted, the verdict and judgment, are all in harmony, but judgment is erroneous from a wrong construction given to the description of land in a deed in evidence, the Supreme Court can not modify the judgment, but a new trial will be granted.<sup>216</sup>

§ 5133. **Decisions on appeal.** A decision of the court is its judgment; the opinion is the reasons given for that judgment. The former, being entered on record immediately, can only be changed upon a petition for rehearing or a modification. The latter is the property of the judges, subject to their revision, correction, and modification, until it is transcribed on the record with the consent of the writer, when it ceases to be the subject of change, except through regular proceedings before the court by petition.<sup>217</sup> The Legislature can not require the Supreme Court to give the reasons of its decisions in writing. The constitutional duty of the court is discharged by the rendition of its decision.<sup>218</sup>

§ 5134. **Rehearing.** When judgment has been pronounced in the appellate court, and before the *remittitur* has been sent, a rehearing may be granted.<sup>219</sup> But after an order had been made granting a rehearing, the filing of the *remittitur* in the court below did not take away the jurisdiction to hear the

<sup>214</sup> *People v. Acosta*, 10 Cal. 195.

<sup>215</sup> *Speyer v. Ihmels*, 21 Cal. 280; 81 Am. Dec. 157.

<sup>216</sup> *Hicks v. Coleman*, 25 Cal. 122; 85 Am. Dec. 103.

<sup>217</sup> *Houston v. Williams*, 13 Cal. 24; 73 Am. Dec. 565.

<sup>218</sup> *Id.*

<sup>219</sup> Rule 20, Cal. Sup. Ct.; *Grogan v. Ruckle*, 1 Cal. 193; *Ruse v. Mut. Life Ins. Co.*, 24 N. Y. 653; *Hoyt v. Thompson's Ex'r*, 19 *id.* 207; *Durkee v. Garvey*, 84 Cal. 590.

cause.<sup>220</sup> Where the judgment was rendered by the Supreme Court in its original jurisdiction on an application in *mandamus*, an application for a rehearing will not be entertained, unless a motion for a new trial is made, as in cases arising in the District Courts.<sup>221</sup>

§ 5135. **Motion to amend.** A motion to amend the judgment of the Supreme Court must be made within the time allowed for filing a petition for rehearing.<sup>222</sup> A material modification should not be made on such a motion; rehearing should be first granted.<sup>223</sup> A judgment of affirmance, for failure of the appellant to appear, will be set aside on a rehearing, where actual notice of argument was not given.<sup>224</sup>

§ 5136. **Points.** On a rehearing, a party will not be permitted to raise any point which was not urged on the first argument.<sup>225</sup>

§ 5137. **Practice on rehearing.** The petition filed must include all grounds on which the rehearing is claimed; those not included are deemed waived.<sup>226</sup> The employment of new counsel after decision rendered is no ground for an extension of time for filing a petition for rehearing.<sup>227</sup> Where respondent filed a petition for the modification of a final judgment, it was held to be a petition for a rehearing.<sup>228</sup>

<sup>220</sup> *Grogan v. Ruckle*, 1 Cal. 193.

<sup>221</sup> *People v. Coon*, 25 Cal. 635.

<sup>222</sup> *Gray v. Palmer*, 11 Cal. 341. After the appellant has rested his case on certain points of the record, he will not be granted a rehearing upon an amended record. *Lybarger v. State*, 2 Wash. St. 552.

<sup>223</sup> *Clark v. Boyreau*, 14 Cal. 634; *Argenti v. San Francisco*, 30 id. 458. Modification of judgment and rehearing denied. *Winter v. Fulstone*, 20 Nev. 261.

<sup>224</sup> *Lightstone v. Lawrence*, 2 Cal. 106.

<sup>225</sup> *Grogan v. Ruckle*, 1 Cal. 193; see *Atherton v. Sup. San Mateo Co.*, 48 id. 160; *Mount v. Mitchell*, 32 N. Y. 702; *Kellogg v. Cochran*, 87 Cal. 192; *People v. Northey*, 77 id. 618; *San Francisco v. Pacific Bank*, 89 id. 23.

<sup>226</sup> *Wilson v. Broder*, 24 Cal. 190.

<sup>227</sup> *Ferris v. Coover*, 10 Cal. 589; see, also, *Hanson v. McCue*, 43 id. 178; *Bernal v. Wade*, 46 id. 640.

<sup>228</sup> *Gray v. Gray*, 11 Cal. 341; *Rhea v. Surrhyne*, 39 id. 581. Under Washington Code of Procedure, section 1439, the applicant for rehearing is not entitled to argue his application orally before the court. *Thompson v. Lumber Co.*, 4 Wash. St. 600. When oral

§ 5138. **When it will be granted.** When no copy of appellant's briefs was served upon respondent, and the court decides the case against him without any brief on his part, a rehearing will be granted on application.<sup>229</sup>

§ 5139. **When not granted.** When there was a conflict of evidence, plaintiff and defendant being the only witnesses in the court below on which the verdict and judgment were rendered, motion for rehearing was denied.<sup>230</sup> An equal division of the justices of the Supreme Court upon the question of granting a rehearing is a denial thereof.<sup>231</sup>

argument deemed abandoned on petition for rehearing. *Marshall Silver Min. Co. v. Kirtley*, 12 Col. 410. Petition for rehearing is a pleading and should not be an argument. *Enright v. Grant*, 5 Utah, 400. A rehearing will not be granted in the Supreme Court of Utah unless the court failed to consider some material point in the case, or erred in its conclusions, or some material matter has been discovered which was unknown when the case was argued. *In re McKnight*, 4 Utah, 237. Petition for rehearing under South Dakota practice. See *Wright v. Sherman*, 3 S. Dak. 367. Where the *remittitur* has been sent to and filed in the court from which the appeal was taken, without fraud or mistake, the Supreme Court has no jurisdiction to grant a rehearing. *Wallace v. Stutsman County*, 6 Dak. 1. A petition for a rehearing in the Supreme Court of California can not be made in a case of *habeas corpus*. *Ex parte Robinson*, 71 Cal. 608. And when a case has been heard and decided by the Supreme Court in department, and afterwards by the court in bank, the right to petition for a rehearing in bank will not be recognized. *Hegard v. Ins. Co.*, 72 Cal. 535; see *Durgin v. Neal*, 82 id. 595.

<sup>229</sup> *Patterson v. Ely*, 19 Cal. 28. The power of the Supreme Court of California to grant rehearings by orders of the court entered upon its minutes, without the written signatures of five justices, must be affirmed upon the principle of *stare decisis*. *In re Jessup*, 81 Cal. 408.

<sup>230</sup> *Fisher v. Merwin*, 25 How. Pr. 284.

<sup>231</sup> *Ayres v. Bensley*, 32 Cal. 632.

## CHAPTER V.

### REMITTITUR.

§ 5140. **In general.** The cause having been finally disposed of in the highest court in the state, a *remittitur* is sent down instructing the court below as to the nature of such decision, and judgment is entered accordingly; or if a new trial is ordered, the cause again takes its place upon the Superior Court calendar; or if the judgment is ordered modified, an order is entered in the court below showing the nature of the modification, and it then becomes and is a final judgment. Where the appellate court reverses the judgment of the court below, and directs the entry of a final judgment, such entry of judgment on *remittitur* can be made in vacation, the act of the clerk in entering being merely ministerial.<sup>1</sup> When judgment is rendered upon the appeal, it must be certified by the clerk of the Supreme Court to the clerk with whom the judgment-roll is filed, or the order appealed from is entered. In cases of appeal from the judgment, the clerk with whom the roll is filed must attach the certificate to the judgment-roll, and enter a minute of the judgment of the Supreme Court on the docket against the original entry. In cases of appeal from an order, the clerk must enter at length in the records of the court the certificate received, and minute against the entry of the order appealed from a reference to the certificate, with a brief statement that such order has been affirmed, reversed, or modified by the Supreme Court on appeal.<sup>2</sup> If it award a new trial, the clerk will place the cause on the calendar.<sup>3</sup> In New York, it would seem, the practice is different; there the matter should be presented to the court on motion, and a suitable order applied for.<sup>4</sup> When the *remittitur* has been duly and regularly

<sup>1</sup> *McMillan v. Richards*, 12 Cal. 467; *Dale v. Rosevelt*, 1 Wend. 25.

<sup>2</sup> Cal. Code Civ. Pro., § 958.

<sup>3</sup> *Marysville v. Buchanan*, 3 Cal. 212.

<sup>4</sup> *Chautauqua Co. Bank v. White*, 23 N. Y. 347; *Seacord v. Morgan*, 17 How. Pr. 394; S. O., 4 Abb. Pr. (N. S.) 249; but see *Judson v. Gray*, 17 How. Pr. 289.

issued from the Supreme Court, and filed in the court below, the Supreme Court loses all jurisdiction over the case,<sup>5</sup> except in cases of the dismissal of an appeal obtained by fraud.<sup>6</sup> A *remittitur* issued by mistake may be recalled;<sup>7</sup> so where it is improperly issued from other causes.<sup>8</sup> But a motion, therefore, to vacate a judgment on the ground that it was not rendered by the proper members of the court can not be entertained after the *remittitur* has been filed below.<sup>9</sup> But the appellate court does not lose its jurisdiction while the order of dismissal is retained in counsel's hands;<sup>10</sup> nor until it is filed in the court below.<sup>11</sup> But may modify it while *in transitu*.<sup>12</sup> Where the *remittitur* was irregular, by default taken contrary to stipulation, the court recalled the papers.<sup>13</sup> A *remittitur* is proper whenever any order is made which finally disposes of the appeal, though it may not be an order on the merits.<sup>14</sup>

§ 5141. **Amendment.** But it may be amended by motion in the court above in respect to a clear inaccuracy, as of miscalculation, etc.;<sup>15</sup> or proceedings may be stayed by the court below on suggestion from the court above, but not otherwise;<sup>16</sup> or the *remittitur* might be vacated by the appellate court if irregularly entered, or entered upon false affidavits.<sup>17</sup>

<sup>5</sup> *Blanc v. Bowman*, 22 Cal. 23; *Leese v. Clark*, 20 id. 387; *Latson v. Wallace*, 9 How. Pr. 334; *Legg v. Overbagh*, 4 Wend. 188; 21 Am. Dec. 115; *Delaplaine v. Bergen*, 7 Hill, 591; *Dresser v. Brooks*, 2 N. Y. 559; *Martin v. Wilson*, 1 id. 240; *Frazer v. Weston*, 3 How. Pr. 235.

<sup>6</sup> *Rowland v. Kreyenhagen*, 24 Cal. 52; see, also, *Estate of Levinson*, 108 id. 450; *People v. McDermott*, 97 id. 247; *De Baker v. Carillo*, 52 id. 473; *Wallace v. Stutsman Co.*, 6 Dak. 1; *Herrlich v. McDonald*, 83 Cal. 505; *Fenton v. County*, 4 Utah, 466.

<sup>7</sup> *Vance v. Pena*, 36 Cal. 328.

<sup>8</sup> *Hanson v. McCue*, 43 Cal. 178; *Bernal v. Wade*, 46 id. 640.

<sup>9</sup> *Blanc v. Bowman*, 22 Cal. 23.

<sup>10</sup> *Thompson v. Blanchard*, 2 N. Y. 561.

<sup>11</sup> *Burkle v. Luce*, 1 N. Y. 239.

<sup>12</sup> *Hosack v. Rogers*, 7 Paige Ch. 108.

<sup>13</sup> *Chamberlain v. Fitch*, 2 Cow. 243; *Newton v. Harris*, 8 Barb. 306.

<sup>14</sup> *Dresser v. Brooks*, 2 N. Y. 559; S. C., 4 How. Pr. 207.

<sup>15</sup> *Palmer v. Lawrence*, 5 N. Y. 455; *Griswold v. Haven*, 26 How. Pr. 170.

<sup>16</sup> *Jarvis v. Shaw*, 16 Abb. Pr. 415; *Selden v. Vermilya*, 3 Sandf. 683; *Bogardus v. Rosendale Manf. Co.*, 1 Duer, 592.

<sup>17</sup> *Newton v. Harris*, 8 Barb. 306.

§ 5142. **Costs.** On a total affirmance or reversal, the costs follow the decision, and the prevailing party is entitled to them.<sup>18</sup> But when a new trial is ordered, or the judgment modified, the costs of appeal are in the discretion of the court.<sup>19</sup> The words "with costs" added to the judgment, and annexing to the *remittitur* a copy of the bill of costs, are a sufficient awarding of costs.<sup>20</sup> The clerk of the Superior Court may thereupon issue execution for costs and damages.<sup>21</sup> The court has power of awarding, in addition to the costs upon affirmance, a further sum for damages caused by the delay.<sup>22</sup> The *remittitur* may order costs of appeal to abide the event of a new trial.<sup>23</sup> Defendants below and appellants here, on the main question, to-wit, the injunction, required to pay costs in this court on both appeals.<sup>24</sup>

§ 5143. **Law of the case.** A decision of the Supreme Court in a case becomes the law of that case in all its future stages,<sup>25</sup> whether the decision be erroneous or not.<sup>26</sup> And can not on a second appeal be altered or changed, unless the conditions on which it was founded are so changed as to render its accomplishment impracticable.<sup>27</sup> Where there is an intervention

<sup>18</sup> *White v. Anthony*, 23 N. Y. 164.

<sup>19</sup> Cal. Code Civ. Pro., § 1027; see § 4833, *ante*.

<sup>20</sup> *Marysville v. Buchanan*, 3 Cal. 212.

<sup>21</sup> *Id.*; affirmed in *McMillan v. Vischer*, 14 Cal. 232; *Ex parte Burrill*, 24 *id.* 350.

<sup>22</sup> Cal. Code Civ. Pro., § 957; *Dreyfuss v. Giles*, 79 Cal. 409; *Lemon v. Rucker*, 80 *id.* 609; *Whitby v. Rowell*, 82 *id.* 635; *Ramsey v. Cattle Co.*, 6 Mont. 498; *Dold v. Robertson*, 3 N. Mex. 313; *Hawkins v. Jones*, 21 Oreg. 502. Right of appellee to damages on failure of appellant to file transcript. *Shafer v. Second Nat. Bank*, 4 N. Mex. 141; compare *Lester v. Elwert*, 25 Oreg. 102.

<sup>23</sup> *Marsh v. Benson*, 34 N. Y. 358.

<sup>24</sup> *Jungerman v. Bovee*, 19 Cal. 355.

<sup>25</sup> *Davidson v. Dallas*, 15 Cal. 75; *Hubbard v. Sullivan*, 18 *id.* 503; *Nieto v. Carpenter*, 21 *id.* 455; *Table Mt. Tun. Co. v. Stranahan*, *id.* 548; *Moore v. Murdock*, 26 *id.* 524; *Lucas v. San Francisco*, 28 *id.* 591; *Kille v. Tubbs*, 32 *id.* 382; *Argenti v. Sawyer*, *id.* 414; see § 4755, *ante*.

<sup>26</sup> *Davidson v. Dallas*, 15 Cal. 75; *Gunter v. Laffan*, 7 *id.* 583; *Clary v. Hoagland*, 6 *id.* 685.

<sup>27</sup> *Estate of Pacheco*, 29 Cal. 224; *Mitchell v. Davis*, 23 *id.* 381. To same effect, consult the following decisions: *Thompson v. White*, 76 Cal. 381; *Stanton v. French*, 91 *id.* 274; *Emeric v. Alvarado*, 90 *id.* 444; *Klauber v. Car Co.*, 98 *id.* 105; *Mills v. Life Association*, 105 *id.* 232; *Gould v. Adams*, 108 *id.* 365; *Mahan v. Wood*,

in ejectment, and judgment for the plaintiff against both defendant and the intervenor, each of whom take a separate appeal from the judgment and order denying a new trial, the affirmance of the judgment and order on the appeal of the defendant does not preclude the Supreme Court from afterwards reversing both on the appeal by the intervenor, and ordering judgment in his favor.<sup>28</sup> And such decision is conclusive on the rights of the parties, and is not subject to revision;<sup>29</sup> and is a final adjudication from which the court can not depart, nor the parties relieve themselves.<sup>30</sup> The discussion and determination of other points not tending to the decision of the point upon which the appeal was disposed of must be regarded as *dicta*, and not as the law of the case.<sup>31</sup> The doctrine of the law of the case applies equally to actions of ejectment as to other actions, and without consideration as to the importance of the questions involved.<sup>32</sup> Where an appeal is taken from an order granting a preliminary injunction, and the order is reversed, the opinion of the court will not apply to any new state of facts which may appear on the record, or an appeal from the final judgment.<sup>33</sup>

105 id. 12; Benson v. Shotwell, 103 id. 163; Krumdick v. White, 107 id. 37; Israel v. Arthur, 18 Col. 158; Palmer v. Murray, 8 Mont. 174; Kelley v. Cable Co., id. 440; Davenport v. Kleinschmidt, id. 467; Plymouth County Bank v. Gilman, 3 S. Dak. 170; Venard v. Green, 4 Utah, 456; Wilkes v. Davies, 8 Wash. St. 112; Powell v. Railroad Co., 14 Oreg. 22; Thompson v. Hawley, 16 id. 251; Kane v. Rippey, 22 id. 299. But this rule does not apply to points not made or passed upon on the former appeal, nor to new points upon the second appeal, nor to questions of fact. People v. Hamilton, 103 Cal. 488; Mattingly v. Pennle, 105 id. 514; Johnson v. Bailey, 17 Col. 59; Bloomfield v. Bachman, 14 Oreg. 181. The rule of the law of the case has no application to questions of fact, and nothing said in the opinion on a former appeal as to the facts can bind the trial court upon a second trial or be conclusive upon a second appeal. Heldt v. Minor, 113 Cal. 385; Benson v. Shotwell, 103 Cal. 163; Cross v. Zellerbach, 63 id. 623, and cases cited above.

<sup>28</sup> Donner v. Palmer, 45 Cal. 180.

<sup>29</sup> Dewey v. Gray, 2 Cal. 374; Soule v. Ritter, 20 id. 522; Leese v. Clark. id. 387.

<sup>30</sup> Phelan v. San Francisco, 20 Cal. 39; Lucas v. San Francisco, 28 id. 591.

<sup>31</sup> Mulford v. Estudillo, 32 Cal. 131; Wixson v. Devine, 80 Cal. 385; compare Gwinn v. Hamilton, 75 id. 265; San Francisco v. Spring Valley Water Works, 53 id. 608.

<sup>32</sup> Leese v. Clark, 20 Cal. 387.

<sup>33</sup> Trinity Co. v. McCammon, 25 Cal. 119.

§ 5144. **Proceedings subsequent.** If the Supreme Court directs the judgment of the court below to be modified, the court below can not open it so as to change it in any particular than as directed;<sup>34</sup> nor can the court below refuse to give effect to the judgment of the appellate court.<sup>35</sup> So also in case of reversal by Supreme Court of the United States; and if the mandate is filed in the court below its judgment is reversed, even if the lower court denies a motion to make its judgment conform to that of the United States Supreme Court.<sup>36</sup> The court below has no authority to prevent the immediate execution of the judgment so remitted.<sup>37</sup> Nor has the lower court the power to modify the judgment so remitted.<sup>38</sup>

§ 5145. **Restitution.** When the judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as the restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment, or had under process issued upon the judgment on the appeal from which the proceedings were not stayed.<sup>39</sup> Where final judgment is rendered for appellant, the court should exercise the power of restitution.<sup>40</sup> The power of restitution existing in the Supreme Court does not exclude the lower courts from exercising the same power.<sup>41</sup> This does not cover the case of a judgment for the recovery of money. It applies only to those cases where the judgment operates upon specific property in

<sup>34</sup> *Meyer v. Kohn*, 33 Cal. 484.

<sup>35</sup> *McMillan v. Richards*, 12 Cal. 467.

<sup>36</sup> *Reynolds v. Hosmer*, 45 Cal. 616.

<sup>37</sup> *Marysville v. Buchanan*, 3 Cal. 212; *McMillan v. Richards*, 12 id. 467.

<sup>38</sup> *Argenti v. San Francisco*, 30 Cal. 458; *Rogers v. Paterson*, 4 Paige Ch. 409; *Griswold v. Havens*, 16 Abb. Pr. 413; *Quackenbush v. Leonard*, 10 Paige Ch. 131; *McGregor v. Buell*, 17 Abb. Pr. 31; see, also, *State v. Superior Court*, 7 Wash. St. 234; compare *Spinning v. Drake*, id. 1. If a cause has been reversed upon appeal and sent back for retrial, the failure of the lower court to comply with the directions for retrial is ground of error. *Building Assoc. v. Clark*, 8 Wash. St. 289.

<sup>39</sup> Cal. Code Civ. Pro., § 957; *Polack v. Shafer*, 46 Cal. 270; *Pico v. Cuyas*, 48 id. 639; see, also, *Raun v. Reynolds*, 18 id. 276.

<sup>40</sup> *Estus v. Baldwin*, 9 How. Pr. 80; see *Britton v. Phillips*, 24 id. 111.

<sup>41</sup> *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459.



such a manner that its title is not changed; as by directing the possession of real estate, or the delivery of documents, or of particular personal property in the hands of the defendant, and the like.<sup>42</sup> A motion for restitution should be made before the entry of judgment, of which it then becomes a part.<sup>43</sup>

§ 5146. *Stay of proceedings.* The presiding judge of the highest court in a State has no power to grant a stay of proceedings on a judgment rendered in that court, until an application can be made to some justice of the Supreme Court of the United States to issue citation on a writ of error.<sup>44</sup>

<sup>42</sup> *Farmer v. Rogers*, 10 Cal. 335; and see *Hewitt v. Dean*, 91 id. 617; *Water Co. v. Drinkhouse*, 95 id. 220; *School District v. Supervisors*, 97 id. 439.

<sup>43</sup> *Kennedy v. O'Brien*, 2 E. D. Smith, 41; *Lott v. Swezey*, 29 Barb. 87.

<sup>44</sup> *Greely v. Townsend*, 25 Cal. 614. Authority of trial court to stay proceedings. See *Rhodes v. Spencer*, 68 Cal. 199. Issue of writ of *supersedeas* for the purpose of staying proceedings in the Superior Court. See *Dulin v. Coal Co.*, 98 Cal. 304.

## CHAPTER VI.

### APPEALS FROM SUPERIOR COURT TO THE SUPREME COURT IN PROBATE AND OTHER PROCEEDINGS.

§ 5147. *When may be taken.* Appeals may also be taken to the Supreme Court from the Superior Courts in the following cases: 1. From a final judgment in an action of forcible entry and detainer; in an action to prevent or abate a nuisance; in a proceeding in insolvency; and in any special cases and proceedings; and in cases which involve the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars; 2. From an order granting or refusing a new trial in the cases designated, and from any special order made after final judgment in such cases.<sup>1</sup>

§ 5148. *In probate proceedings.* An appeal may be taken to the Supreme Court from a judgment or order of the Probate Court: 1. Granting or refusing or revoking letters testamentary, or of administration, or of guardianship; 2. Admitting or refusing to admit a will to probate; 3. Against or in favor of the validity of a will, or revoking the probate thereof; 4. Against or in favor of setting apart property, or making an allowance for a widow or child; 5. Against or in favor of directing the partition, sale, or conveyance of real property; 6. Settling an account of an executor or administrator or guardian; 7. Refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; 8. Granting or overruling a motion for a new trial; 9. Confirming or refusing to confirm a report of an appraiser setting apart the homestead.<sup>2</sup> But an order of the Probate Court, setting aside a judgment of that court refusing to admit a will to probate, is not appealable;<sup>3</sup> nor is an order

<sup>1</sup> Cal. Code Civ. Pro., § 966.

<sup>2</sup> Id., § 969.

<sup>3</sup> Peralta v. Castro, 15 Cal. 511.

refusing to quash an execution.<sup>4</sup> When an executor or administrator who has given an official undertaking appeals from a judgment or order of Probate Court made in the estate which he represents, his official undertaking stands in the place of an undertaking on appeal, and his sureties thereon are liable.<sup>5</sup>

§ 5149. **Contested elections.** The Supreme Court has jurisdiction on appeal in contested election cases.<sup>6</sup>

§ 5150. **Orders not appealable.** No appeal lies from the appointment of a special administrator;<sup>7</sup> nor from an order setting aside its own proceedings had by the Probate Court before final order, upon application of the surviving wife for a homestead.<sup>8</sup> But an order dismissing a petition to have an administrator show cause why an allowed claim should, not be paid was held to be appealable.<sup>9</sup> Appeal does not lie from an order refusing to set aside an order of sale.<sup>10</sup>

§ 5151. **Parties.** On an appeal from an order removing a guardian of an estate and appointing another guardian in his place, taken by the removed guardian, the newly-appointed guardian is a necessary party.<sup>11</sup> Where the Probate Court settles the basis upon which an account shall be stated, and directs

<sup>4</sup> *Blum v. Brownstone*, 50 Cal. 293.

<sup>5</sup> Cal. Code Civ. Pro., § 970; see § 5025, n., *ante*.

<sup>6</sup> Cal. Code Civ. Pro., § 1126; *Knowles v. Yates*, 31 Cal. 82; *Day v. Jones*, id. 261; *Webster v. Byrnes*, 34 id. 273; *Lord v. Dunster*, 79 id. 477.

<sup>7</sup> Id., § 1413.

<sup>8</sup> *Estate of Johnson v. Tyson*, 45 Cal. 257; see, also, *Peralta v. Castro*, 15 id. 511.

<sup>9</sup> *Estate of McKinley*, 49 Cal. 152.

<sup>10</sup> *Estate of Smith*, 51 Cal. 563. Under California practice, appeals can only be taken from such judgments or orders in probate proceedings as are mentioned in section 963, Code of Civil Procedure. *In re Moore*, 86 Cal. 58; *In re Walkerly*, 94 id. 352; and see *In re Smith*, 98 id. 639; *Harper v. Hildreth*, 99 id. 269; *Ex parte Orford*, 102 id. 657; § 4944, *ante*. An order settling the account of an executor or administrator is appealable. *Estate of Coutts*, 87 Cal. 480; *Estate of Rose*, 80 id. 166. So of an order made in a proceeding for the settlement of the estate of a decedent, authorizing an executor to mortgage the lands of the estate. *Estate of McConnell*, 74 Cal. 217. So of an order of the Probate Court appointing a guardian of a minor. *Get Young, Guardianship of*, 90 Cal. 77.

<sup>11</sup> *Guardianship, etc., of Medbury*, 48 Cal. 83.

that if the administrator refuses to so state it the creditor shall do so, the error, if any, of ordering the creditors to state the account is immaterial on appeal by the administrator;<sup>12</sup> nor can an executor maintain an appeal from an order of distribution on the ground that the distribution is not made in proper proportions, as he has no interest in that question.<sup>13</sup>

§ 5152. **Transcript.** On an appeal from a decree of a Probate Court on a final accounting and settlement, the petition and account filed with a view to the final settlement are a part of the record to be used on appeal.<sup>14</sup> The statement must state specifically the particular errors or grounds upon which the appellant intends to rely.<sup>15</sup>

<sup>12</sup> Estate of Miner, 46 Cal. 564.

<sup>13</sup> Estate of Wright, 49 Cal. 550.

<sup>14</sup> Estate of Isaacs, 30 Cal. 105.

<sup>15</sup> Estate of Boyd, 25 Cal. 511.

## CHAPTER VII.

### APPEALS FROM JUSTICES' COURTS, AND OTHER JUDICIAL OR QUASI-JUDICIAL SOURCES, TO SUPERIOR COURTS.

§ 5153. *When lien.* Any party dissatisfied with a judgment rendered in a civil action in a police or justice's court may appeal therefrom to the Superior Court.<sup>1</sup> Such courts have sole appellate jurisdiction in such cases,<sup>2</sup> and such appeals are a bar to the remedy by *certiorari*,<sup>3</sup> but if the time for appeal has elapsed, plaintiff can apply to the Superior Court for a writ of *certiorari*, and thus review the action of the justice in rendering the judgment, so far as questions of jurisdiction are concerned.<sup>4</sup>

§ 5154. *Appeal, how taken.* The appeal is taken by filing a notice of appeal with the justice or judge, and serving a copy on the adverse party. The notice must state whether the appeal is taken from the whole or a part of the judgment, and if from a part, what part, and whether the appeal is taken on questions of law or fact, or both.<sup>5</sup> But an appeal is not effectual for any purpose unless an undertaking be filed.<sup>6</sup>

<sup>1</sup> Cal. Code Civ. Pro., § 974.

<sup>2</sup> *People v. Fowler*, 9 Cal. 85; *Denmark v. Llening*, 10 id. 93; *Hunter v. Hoole*, 17 id. 418; *Comstock v. Clemens*, 19 id. 77. Under the Constitution and prior to any act of the Legislature relating to appeals from Justices' Courts, the Superior Court had jurisdiction of such appeals. *California, etc., Co. v. Superior Court*, 60 Cal. 305. But the constitutional provision limits the exercise of the appellate jurisdiction of the Superior Court to the extent and mode which the Legislature may prescribe. The steps prescribed by statute must be strictly pursued. *Sherer v. Superior Court*, 94 Cal. 354; also, *Steel v. Rees*, 13 Oreg. 428.

<sup>3</sup> *Gray v. Schupp*, 4 Cal. 185; *Coulter v. Stark*, 7 id. 244; *Clary v. Hoagland*, 13 id. 173; *People v. Shepard*, 28 id. 115.

<sup>4</sup> *Comstock v. Clemens*, 19 Cal. 77; *People v. Johnson*, 30 id. 98. As to appeals in special statutory cases, see *Burson v. Cowles*, 25 Cal. 535; *People v. Halloway*, 26 id. 651.

<sup>5</sup> Cal. Code Civ. Pro., § 974.

<sup>6</sup> Id., § 978. To effectuate an appeal from the judgment of a justice of the peace, there must be a notice of appeal, a service of it on the adverse party, and the filing of it and of an undertaking

§ 5155. **Costs.** One of the conditions upon which an appeal is allowed from Justices' Courts is the payment of the costs of the action.<sup>7</sup> An offer to pay costs as soon as the papers are made out is not a sufficient tender.<sup>8</sup> The justice is not bound to first make out the papers, and then rely on his fees being paid;<sup>9</sup> but may do so if he so elect;<sup>10</sup> and he must make a demand for his fees;<sup>11</sup> but if he send up his case without receiving his fees, that in itself is not a ground for dismissing the appeal.<sup>12</sup> A return to an alternative *mandamus* to compel a justice to send up papers on appeal that his fees had not been paid or tendered "prior to the service of the writ" is no defense to making the writ peremptory, as they may have been paid since.<sup>13</sup>

§ 5156. **Dismissal.** When the appeal is dismissed, because of a failure to prosecute or for want of jurisdiction, costs may be adjudged against the appellant.<sup>14</sup> And a failure to produce in the Superior Court a duly certified copy of the justice's docket is a failure to prosecute.<sup>15</sup> But the appeal can only be dismissed after notice.<sup>16</sup> The Superior Court can not arbitrarily dismiss the appeal.<sup>17</sup> In denying a motion to dismiss, the Supreme Court will presume that the Superior Court did not abuse its discretion, when there is no showing to the contrary.<sup>18</sup> If the undertaking on appeal is defective in lacking one of the conditions required by law, it is error to dismiss the appeal if the appellant offers to remedy it as to such defect.<sup>19</sup> Where

for costs, with the justice, and all of these acts must be done within the time prescribed by the statute for taking the appeal. *Rudolph v. Herman*, 2 S. Dak. 399; approving *Coker v. Superior Court*, 58 Cal. 177; *Edminster v. Rathbun*, 3 S. Dak. 129; *McKeen v. Naughton*, 88 Cal. 462.

<sup>7</sup> *McDermott v. Douglass*, 5 Cal. 89; Cal. Code Civ. Pro., § 977; *Webster v. Hanna*, 102 Cal. 177.

<sup>8</sup> *People v. Harris*, 9 Cal. 571.

<sup>9</sup> *Id.*

<sup>10</sup> *Lick v. Madden*, 25 Cal. 203.

<sup>11</sup> *Id.*

<sup>12</sup> *Bray v. Redman*, 6 Cal. 287.

<sup>13</sup> *People v. Harris*, 9 Cal. 571.

<sup>14</sup> *Blair v. Cummings*, 39 Cal. 667.

<sup>15</sup> *People v. Elkins*, 40 Cal. 642.

<sup>16</sup> *Id.*; Cal. Code Civ. Pro., § 980.

<sup>17</sup> *Fabretti v. Superior Court*, 77 Cal. 305.

<sup>18</sup> *State v. Campbell*, 5 Wash. St. 517.

<sup>19</sup> *Keehl v. Schaller*, 6 Dak. 499.

the appeal is erroneously dismissed for a supposed insufficiency in the undertaking the remedy of the appellant is by *certiorari* to annul the order of dismissal, before proceeding by *mandamus* to compel the hearing of the appeal.<sup>20</sup> An appeal taken on questions of law alone can not be dismissed on the ground that the appeal should have been taken on questions of law and fact, if the statement on appeal contains the evidence upon which the question of law involved in the appeal was raised and decided in the Justice's Court, and such dismissal will be annulled on *certiorari*.<sup>21</sup> But an order dismissing an appeal for failure to file a record and transcript within the time prescribed by a rule of the Superior Court, can not be annulled on *certiorari*.<sup>22</sup> An order of the Superior Court vacating a previous order of dismissal, and recalling execution, leaves the cause undetermined and pending before it, as it was when the appeal was first perfected, nor is it necessary to the validity of such order that it should be filed in the Justice's Court.<sup>23</sup>

§ 5157. **Jurisdiction.** The objection that a Superior Court has no jurisdiction in cases of appeal to it from a lower court, where no bond is given as required by statute, should be made in the County Court, as the judge thereof, in his discretion, on hearing excuse, might allow appellant to file a bond.<sup>24</sup> So, also, the allowance of an amendment to the complaint is in the discretion of the Superior Court.<sup>25</sup> The Superior Court has jurisdiction of an appeal from a Justice's Court, in an action tried by jury, although when the appeal was taken no judgment had been entered by the justice in conformity with the verdict.<sup>26</sup> So, generally, the Superior Court having regularly acquired jurisdiction over the cause by the appeal, all proper proceedings in the cause thereafter are as fully within the power of that court as if the cause had been commenced therein, and

<sup>20</sup> *Levy v. Superior Court*, 66 Cal. 292.

<sup>21</sup> *Carlson v. Superior Court*, 70 Cal. 628.

<sup>22</sup> *McKay v. Superior Court*, 86 Cal. 431. Dismissal of appeal for failure to prosecute, review. See *Alexander v. Municipal Ct. of App.*, 66 Cal. 387.

<sup>23</sup> *Bullard v. McArdle*, 98 Cal. 355; 35 Am. St. Rep. 176.

<sup>24</sup> *Howard v. Harman*, 5 Cal. 78; *Coulter v. Stark*, 7 id. 244; see, also, *Blair v. Hamilton*, 32 id. 50.

<sup>25</sup> *Canfield v. Bates*, 13 Cal. 606.

<sup>26</sup> *Montgomery v. Superior Court*, 68 Cal. 407.

it may properly dispose of the defense of want of jurisdiction before considering the merits of the case upon the appeal.<sup>27</sup>

§ 5158. **New trial.** When the appeal is on questions of fact, or on questions of both law and fact, no statement need be made, but the action must be tried anew in the Superior Court.<sup>28</sup> In case of a judgment by default before the justice no appeal can be had on questions of fact, and there can be no new trial on appeal, nor can questions of law be reviewed unless on a statement.<sup>29</sup> Superior Court may grant a new trial of a case which has been once tried before it on appeal from Justice's Court; and thereupon it is the duty of the county judge to settle a statement duly presented.<sup>30</sup> On an appeal from a Justice's Court, taken on questions of law and fact, the Superior Court has no authority to remand the cause from whence it came, for trial *de novo*, but must itself proceed with the trial, and in case of refusal may be compelled to do so by *mandamus*.<sup>31</sup> But the Superior Court can not try the action *de novo*, unless a trial upon the issues of fact as made in the Justice's Court had been had in that tribunal.<sup>32</sup> The Superior Court has original jurisdiction of all questions pertaining to the title or possession of real property, and having jurisdiction of the parties upon the appeal from the Justice's Court, may properly try an issue as to the possession and right of possession of land.<sup>33</sup> Upon appeal

<sup>27</sup> *Holbrook, etc. v. Superior Court*, 106 Cal. 589. If a justice of the peace has no jurisdiction of the subject-matter of an action brought before him, the Superior Court can not acquire jurisdiction thereof by appeal from the justice. *State v. Superior Court*, 9 Wash. St. 369.

<sup>28</sup> Cal. Code Civ. Pro., § 976.

<sup>29</sup> *People v. El Dorado Co. Ct.*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 id. 328; and see *Rickey v. Superior Court*, 59 id. 661. Upon an appeal from a judgment by default in a Justice's Court, upon questions of law and fact, the Superior Court must entertain and decide the appeal as upon questions of law alone. *Fabretti v. Superior Court*, 77 Cal. 305.

<sup>30</sup> *Cummings v. Irwin*, 40 Cal. 354; and see *White v. Superior Court*, 72 id. 475; *Massman v. Superior Court*, 71 id. 582.

<sup>31</sup> *Acker v. Superior Court*, 68 Cal. 245; and see *Hart v. Carnall-Hopkins Co.*, 103 id. 132; *Missoula, etc., Co. v. Morgan*, 13 Mont. 394; *Forbes v. Inman*, 23 Oreg. 68.

<sup>32</sup> *Myrick v. Superior Court*, 68 Cal. 98. No change in the issues can be made. *Forbis v. Inman*, 23 Oreg. 71; *Currie v. South. Pac. Co.*, 21 id. 566; *Waggy v. Scott*, 29 id. 386.

<sup>33</sup> *Hart v. Carnall-Hopkins Co.*, 103 Cal. 132; see *Cereghino v. District Court*, 8 Utah, 455.



from a judgment in a Justice's Court setting aside a judgment previously rendered, and dismissing the action, the jurisdiction of the Superior Court is limited to a review of the judgment appealed from, and, if of the opinion that the court erred in vacating the previous judgment, it should reverse the judgment appealed from and order a new trial.<sup>34</sup> Petition for a rehearing is a proceeding unknown to the law or to the practice of the Superior Court.<sup>35</sup>

**§ 5159. Statement.** The party appealing, on questions of law alone, shall prepare a statement on appeal within ten days from the rendition of judgment, and file the same with the justice.<sup>36</sup> And the statement must contain the grounds on which appellant intends to rely, and so much of the evidence as may be necessary to explain the grounds, and no more.<sup>37</sup>

**§ 5160. Notice of appeal.**

*Form No. 1164.*

[TITLE.]

You will please take notice, that the plaintiff in the above-entitled action hereby appeals to the Superior Court of the city and county of . . . . ., from the judgment therein made and entered in the said Justice's Court on the . . . . . day of . . . . ., 18.., in favor of said defendant, and against said plaintiff, and from the whole of said judgment. This appeal is taken on questions of both law and fact.

[DATE.]

[SIGNATURE.]

To J. P., justice of said Justice's Court, and G. H., attorney for defendant.

<sup>34</sup> *Sherer v. Superior Court*, 94 Cal. 354.

<sup>35</sup> *Fabretti v. Superior Court*, 77 Cal. 305.

<sup>36</sup> Cal. Code Civ. Pro., § 975; *People ex rel. Jones v. County Court of El Dorado*, 10 Cal. 19; and see *McKay v. Superior Court*, 86 id. 431; *Hart v. Carnall-Hopkins Co.*, 103 id. 132. Under Oregon practice the transcript must be filed in the Circuit Court on or before the first day of the term next following the allowance of the appeal. *Carter v. Monwastes*, 19 Oreg. 538.

<sup>37</sup> Id., § 975; *People ex rel. Jones v. County Court of El Dorado*, 10 Cal. 19; *People v. Freelon*, 8 id. 517. See, as to settlement of statement, Cal. Code Civ. Pro., § 975. If the docket or other papers properly sent up by the justice show the alleged errors, there is no necessity for a statement. *South. Pac. R. R. Co. v. Superior Court*, 59 Cal. 471. Duty of justice to transmit papers on appeal. See Cal. Code Civ. Pro., § 977, as amended by act of 1897.

§ 5161. **Filing of notice.** The filing of notice of appeal and undertaking on appeal, in a Justice's Court, after rendition of the verdict, but before entry of judgment, does not deprive the justice of authority to enter up judgment on the verdict.<sup>38</sup>

§ 5162. **Service of notice.** The general law regulating appeals, which provides that notice may be served on the party or his attorney, must govern cases arising in Justices' Courts.<sup>39</sup> The record not showing that notice was served, appellant may prove by his affidavit that such notice was in fact served.<sup>40</sup>

§ 5162a. **Notice of appeal, etc.—continued.** The filing of the undertaking on appeal, and the filing and service of the notice of appeal from a Justice's Court, may be made at any time within thirty days after the rendition of judgment. The time and order of taking the requisite jurisdictional steps within that limit is, however, immaterial.<sup>41</sup> It is sufficient if the notice of appeal be signed by the appellant personally, or by any one he may select for that purpose.<sup>42</sup> And it may be served on the adverse party personally, notwithstanding he was represented in the Justice's Court by an attorney.<sup>43</sup> Where the adverse party is a corporation, a service on its manager is sufficient to give the Superior Court jurisdiction.<sup>44</sup> The sufficiency of the notice of appeal must appear on its face, and the question whether it is sufficient to give the respondent actual knowledge of the intention of the appellant to appeal can not be gone into.<sup>45</sup> A notice sufficiently describes the judgment which gives the name of the court in which it was rendered, the names of the parties, and the date of the judgment.<sup>46</sup> The voluntary appearance of the respondent and his participation without objection in the trial in the Superior Court, and in the subsequent preparation of a

<sup>38</sup> *Fugitt v. Cox*, 2 Nev. 370.

<sup>39</sup> *Welton v. Garibaldi*, 6 Cal. 245.

<sup>40</sup> *Mendiola v. Orr*, 16 Cal. 368.

<sup>41</sup> *Dutertre v. Superior Court*, 84 Cal. 535; *Hall v. Superior Court*, 68 id. 24; *Brown v. Jessup*, 19 Oreg. 288; and see § 4998, *ante*.

<sup>42</sup> *Totton v. Superior Court*, 72 Cal. 37; *Rutledge v. Superior Court*, 67 id. 85.

<sup>43</sup> *Pacific Coast Railway Co. v. Superior Court*, 79 Cal. 103.

<sup>44</sup> *Id.*

<sup>45</sup> *Neppach v. Jordan*, 13 Oreg. 246.

<sup>46</sup> *Id.*; *Lewis v. Lewis*, 4 Oreg. 209; and see, as to sufficiency of notice, *Starks v. Stafford*, 14 id. 317.

statement for a new trial, is a waiver of any insufficiency in the notice of appeal or in the proof of service thereof.<sup>47</sup>

**§ 5163. Undertaking on appeal.**

*Form No. 1165.*

**[TITLE.]**

Know all men by these presents that we, A. B., principal, and C. D. and E. F., sureties, are held and firmly bound unto G. H., in the sum of ..... dollars, lawful money of the United States of America, to be paid to the said G. H. [his] executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed with our hands, sealed, and dated this ..... day of ....., 18..

The condition of the above undertaking is such, that whereas the said G. H. obtained a judgment against the said A. B., before J. P., Esq., justice of the peace of the ..... township, in the county of ....., state of ....., on the ..... day of ....., 18.., for ..... dollars, principal sum, and for ..... dollars, costs; and whereas the above-bounden A. B. is desirous of appealing from the decision of said justice to the Superior Court of the said county of ....., and a stay of proceedings is claimed: Now, if the above-bounden ..... shall well and truly pay, or cause to be paid, the amount of the said judgment and all costs, and obey any order the said Superior Court may make therein, if the said appeal be withdrawn or dismissed, or pay the amount of any judgment and all costs that may be recovered against the said appellant in the said Superior Court, and obey any order the said court may make therein, then this obligation to be null and void; otherwise to remain in full force and virtue.

**[SIGNATURES AND SEALS.]**

**[AFFIDAVIT OF QUALIFICATION.]**

**§ 5164. Amount.** Undertaking must be in the sum of one hundred dollars, or if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, or twice the value of the property, including costs.<sup>48</sup>

<sup>47</sup> *Matthews v. Superior Court*, 70 Cal. 527.

<sup>48</sup> Cal. Code Civ. Pro., § 978; see *Ward v. Superior Court*, 58 Cal. 519.

§ 5165. **Approval of justice.** It is the duty of the justice of the peace, when an appeal bond is presented, to act without delay. If he receives the bond without objection, it will be too late to disapprove it the next day.<sup>49</sup>

§ 5166. **Bond.** Where objection is made within the proper time, for want of an undertaking or for insufficiency thereof, it is the duty of the presiding judge to hear the excuse of the party failing to produce it, and if sufficient, to allow him to file a bond,<sup>50</sup> or he may be allowed to amend.<sup>51</sup> If the bond be void or defective, a new bond may be filed on terms.<sup>52</sup>

§ 5167. **Justification.** The adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge before whom the appeal is taken, within five days thereafter, upon notice to the adverse party, the appeal must be regarded as if no undertaking had been given.<sup>53</sup> The mere filing of an exception to the sufficiency of sureties with the justice is not sufficient.<sup>54</sup> A party who excepts to the sufficiency of sureties may waive the justification.<sup>55</sup>

<sup>49</sup> *People v. Harris*, 9 Cal. 571.

<sup>50</sup> *Howard v. Harman*, 5 Cal. 78.

<sup>51</sup> *Cunningham v. Hopkins*, 8 Cal. 33.

<sup>52</sup> *Rabe v. Hamilton*, 15 Cal. 31.

<sup>53</sup> Cal. Code Civ. Pro., § 978; and see *McCracken v. Superior Court*, 86 Cal. 74; *Moffat v. Greenwalt*, 90 id. 368.

<sup>54</sup> *Reynolds v. Co. Ct. San Joaquin Co.*, 47 Cal. 604.

<sup>55</sup> *Blair v. Hamilton*, 32 Cal. 49. *Undertaking and sufficiency of.*—An undertaking such as the statute requires is prerequisite to the acquisition of jurisdiction by the Superior Court of an appeal from a Justice's Court. *Levy v. Superior Court*, 66 Cal. 292; *McKeen v. Naughton*, 88 id. 462. But the appellant may make a deposit of money in lieu of an undertaking. *Mullen v. Hunt*, 67 Cal. 69. The appellant may file a new undertaking in lieu of one insufficient in form. *Gray v. Superior Court*, 61 Cal. 337; and see *Hosford v. Logus*, 13 Oreg. 130. But where the sufficiency of the sureties is excepted to the appeal can not be perfected by filing a new undertaking without notice to the adverse party. *Wood v. Superior Court*, 67 Cal. 115. Sufficiency of affidavit of surety on undertaking. See *Brown v. Jessup*, 19 Oreg. 288; *Starks v. Stafford*, 14 id. 317. An undertaking executed by two sureties, one of whom was a practicing attorney in the courts of the state, was held insufficient. *Towle v. Bradley*, 2 S. Dak. 472. It is not essential that the appellant himself should sign the undertaking. *Drouilhat v. Pottner*, 13 Oreg. 493.

§ 5167a. Appeals from Justice's Court—South Dakota procedure. On appeal from a judgment rendered in a Justice's Court, the notice of appeal demanding a new trial, the case goes upon the trial calendar of the Circuit Court "to be tried anew," subject, so far as the trial is concerned, to the provisions of the Code of Civil Procedure.<sup>56</sup> The appeal is subject to be dismissed for failure to prosecute, or unnecessary delay in bringing it to a hearing, but a motion for such purpose can only be made or heard after notice to the appellant.<sup>57</sup> The appellate court must learn the *status* of the case from the transcript and papers transmitted by the justice, and if such transcript is imperfect or insufficient, a further return may be required by the appellate court, but affidavits of parties can not be used to supply what should but does not appear in the justice's transcript.<sup>58</sup>

§ 5167b. Jurisdiction — waiver. By appealing from a judgment of a justice of the peace and going to trial upon the merits in the County Court, the defendant waives the objection that the justice had no jurisdiction over his person.<sup>59</sup>

<sup>56</sup> Keehl v. Scaller, 1 S. Dak. 290; Myers v. Mitchell, id. 249.

<sup>57</sup> Id.

<sup>58</sup> Mouser v. Palmer, 2 S. Dak. 466; also, Plymat v. Brush, 46 Minn. 23.

<sup>59</sup> Glatzel v. Binschadler, 21 Col. 192; and see Mackey v. Briggs, 16 id. 143.

# **PART THIRTEENTH.**

## **FINAL PROCESS.**

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### **CHAPTER I.**

#### **EXECUTION.**

##### **§ 5168. Form of writ.**

*Form No. 1166.*

[TITLE.]

The people of the State of California, to the sheriff of the  
..... county of ....., greeting:

Whereas, on the ..... day of ....., 18.., A. B.,  
plaintiff, recovered a judgment in the said Superior Court of the  
state of ....., in and for the ..... county of  
....., against C. D. for the sum of ..... dol-  
lars damages, with interest at the rate of ..... per cent.  
per ....., till paid, together with costs and disburse-  
ments at the date of said judgment, and accruing costs, amount-  
ing to the sum of ..... dollars, lawful money of the  
United States, as appears to us of record.

And whereas, the judgment-roll in the action in which said  
judgment was entered is filed in the clerk's office of said court,  
in the ..... county of ....., and the said  
judgment was docketed in said clerk's office in the said .....  
county, on the day and year first above written.

And the sum of ..... dollars, with interest thereon,  
is now (at the date of this writ) actually due on said judgment.

Now you, the said sheriff, are hereby required to make the  
said sums due on the said judgment for damages, with interest  
as aforesaid, and costs and accruing costs, to satisfy the said  
judgment, out of the personal property of said debtor; or, if  
sufficient personal property of said debtor can not be found,  
then out of the real property in your county belonging to him,  
on the day whereon said judgment was docketed in the said  
city and county, or at any time thereafter, and make return of

this writ within sixty days after your receipt thereof, with what you have done indorsed hereon.

Witness, Hon. . . . ., judge of the said Superior Court, at the courthouse in the county of . . . . . this . . . . . day of . . . . ., 18..

Attest my hand and the seal of said court, the day and year last above written.

K. L., Clerk.

By O. P., Deputy Clerk.<sup>1</sup>

[SEAL OF COURT.]

§ 5169. **Counties.** No execution can issue upon a judgment rendered against a county.<sup>2</sup>

§ 5170. **Enforcement of judgment.** The court has no power to order the sheriff to levy upon a particular piece of property, even though it decide that such property is not exempt.<sup>3</sup> But the court may order the execution of a writ of possession;<sup>4</sup> or the execution of an order of sale on foreclosure.<sup>5</sup> An execution must be warranted by the judgment. If it exceed the judgment, it has no validity; therefore to authorize an arrest on execution for fraud, the fraud must be stated in the judgment.<sup>6</sup> But the mere fact that an execution directs the levy of more money than the judgment calls for does not render the execution void, but only voidable.<sup>7</sup>

§ 5171. **Execution for deficiency on sale.** Five years of limitation, within which an execution for an unsatisfied balance on a foreclosure sale may be taken out, runs from the date when the balance was docketed.<sup>8</sup> The docketing of a balance remaining due after sale of mortgaged property is not an entry of a new judgment for such balance.<sup>9</sup> Where plaintiffs obtained a decree in a foreclosure suit against husband and wife, the mortgage being executed by them, and the decree being in the usual form for the amount due, sale of the premises, application of the

<sup>1</sup> See Cal. Code Civ. Pro., § 682.

<sup>2</sup> When a judgment is rendered against a county, as to duty of supervisors. See *Emeric v. Gilman*, 10 Cal. 404; 70 Am. Dec. 742.

<sup>3</sup> *Fraser v. Thrift*, 50 Cal. 476; see *Frink v. Roe*, 70 id. 296.

<sup>4</sup> *Leese v. Clark*, 29 Cal. 665.

<sup>5</sup> *Societe D'Espargnes, etc. v. McHenry*, 49 Cal. 351.

<sup>6</sup> *Davis v. Robinson*, 10 Cal. 411.

<sup>7</sup> *Hunt v. Loucks*, 38 Cal. 372; 99 Am. Dec. 404; see Cal. Code Civ. Pro., § 684.

<sup>8</sup> *Bowers v. Crary*, 30 Cal. 621.

<sup>9</sup> *Id.*

proceeds, and execution against the property of the husband for any deficiency, and after the entry of the decree the husband died, it was held that the plaintiffs were entitled to an order of sale upon the decree, notwithstanding the death of the husband, but not to execution for any deficiency.<sup>10</sup>

§ 5172. **Irregular issuance.** An execution not issued in the name of the people, or directed to the sheriff, is amendable, and, therefore, not void but voidable, and a sale under it is valid.<sup>11</sup> So if it erroneously state the date of the judgment, the sheriff is justified in enforcing it.<sup>12</sup> The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the court issuing the writ.<sup>13</sup>

§ 5173. **Levy, effect of.** A levy under an execution, upon sufficient personal property to satisfy the same, is a satisfaction of the judgment, sufficient at least to discharge third persons who are liable collaterally or as sureties therefor; and the release of the property from levy thus made, without consent of the parties thus liable, can not revive their liability;<sup>14</sup> otherwise if the court orders that the judgment be not enforced; there the order releases the levy and the judgment is not satisfied.<sup>15</sup> In Nevada it has been held that if the judgment creditor became the purchaser at an execution sale, and refused to pay the amount of his bid and the property had to be resold, the first sale was not a satisfaction.<sup>16</sup>

§ 5174. **Levy, how made.** A levy on personal property, capable of manual delivery, must be made by taking the property in custody.<sup>17</sup> A levy may be good as against the defendant in

<sup>10</sup> *Cowell v. Buckelew*, 14 Cal. 640.

<sup>11</sup> *Hibberd v. Smith*, 50 Cal. 511; see, also, *Van Cleave v. Bucker*, 79 id. 600; *Flint v. Phipps*, 20 Oreg. 340; 23 Am. St. Rep. 124; *Jones v. Dove*, 7 Oreg. 467.

<sup>12</sup> *Franklin v. Merida*, 50 Cal. 289.

<sup>13</sup> *Gregory v. Ford*, 14 Cal. 143. As to relief from irregular issuance and from void execution, consult *Ryan v. Daly*, 6 Cal. 239; *Solomon v. Maguire*, 29 id. 227; *Domec v. Stearns*, 30 id. 114; *Town of Hayward v. Pimental*, 107 id. 386.

<sup>14</sup> *People v. Chisholm*, 8 Cal. 30; *Mulford v. Estudillo*, 23 id. 94; see *Wright v. Young*, 6 Oreg. 87.

<sup>15</sup> *Mulford v. Estudillo*, 32 Cal. 131; see, also, *Barber v. Reynolds*, 44 id. 519.

<sup>16</sup> *Sweeney v. Hawthorne*, 6 Nev. 130.

<sup>17</sup> *Dutertre v. Driard*, 7 Cal. 549; *Powell v. McKechnie*, 3 Dak. 319.



the writ, and not good as to third persons.<sup>18</sup> As to third persons, there can be no levy when the officer does not know the subject of the levy; as where he stands at the door of a store which is locked, and keeps others out. The levy dates from the time he gets into the store and takes possession.<sup>19</sup> Where judgment debtor owns only an interest in a small, well-defined portion of a large tract, a levy upon his interest in the large tract is, at least, extremely irregular.<sup>20</sup>

§ 5176. *Return, amendment of.* Courts should exercise does not depend in any respect for his title upon the return of the sheriff. He is only bound to see that there is a judgment which is not void, and an execution which is regular upon its face, and the acts of the officer may be presumed to be regular,<sup>21</sup> the statute being directory so far as it deals with the manner in which the officer is required to execute the writ.<sup>22</sup> Moneys collected on execution are usually paid over by the officer before the return of the writ, and the fact of such payment constitutes a part of the return, and if paid, the amount collected and paid over can not be the measure of damages for a subsequent failure to return the writ, where the *gravamen* of the action is the failure to return an execution within the prescribed time.<sup>23</sup>

§ 5176. *Return, amendment of.* Courts should exercise great liberality in allowing sheriffs to amend their returns, so as to make them conform to the true state of facts, and to correct errors and mistakes;<sup>24</sup> but it can not be amended so as to postpone the rights of creditors attaching subsequently but before the correction.<sup>25</sup> The time in which a sheriff makes return to an execution does not affect the validity of the execution or of a sale under it.<sup>26</sup>

<sup>18</sup> Tafts v. Manlove, 14 Cal. 47; 73 Am. Dec. 610.

<sup>19</sup> Herron v. Hughes, 25 Cal. 563; see, as to levy, Smith v. Randall, 6 id. 47; 65 Am. Dec. 475. Duty of sheriff where the money is in custody of a corporation. Howe v. White, 49 Cal. 658.

<sup>20</sup> Logan v. Hale, 42 Cal. 646.

<sup>21</sup> Blood v. Light, 38 Cal. 653.

<sup>22</sup> Id. 654; 99 Am. Dec. 441.

<sup>23</sup> Hoag v. Warden, 37 Cal. 523.

<sup>24</sup> Gavitt v. Doub, 23 Cal. 78.

<sup>25</sup> Newhall v. Provost, 6 Cal. 87; Webster v. Haworth, 8 id. 25. The court can annul a return which shows that the sheriff has applied one execution in payment of another in his hands. McGregor v. Wells, etc., Co., 1 Mont. 142.

<sup>26</sup> Low v. Adams, 6 Cal. 277.

§ 5177. **Return conclusive.** A sheriff's return is not traversable, and a court will not permit it to be attacked collaterally, even if the officer is shown to have been guilty of fraud and collusion;<sup>27</sup> for the presumptions are in favor of the regularity of the acts of the officers.<sup>28</sup> Courts can not know an under-officer, and the act and return of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal.<sup>29</sup>

§ 5178. **Stay of execution.** A judge at chambers has authority to order a suspension of proceedings under an execution until a motion before the court to recall or quash it can be heard.<sup>30</sup> If a judgment upon which an execution issues, and the execution itself, are void upon their face, the court has power, on motion, to afford relief, and can arrest the process.<sup>31</sup>

§ 5179. **When execution may issue.** The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement.<sup>32</sup> The statute does not require the docketing of the judgment to precede either the issuing or service of an execution.<sup>33</sup> As soon as the judgment is entered an execution may issue, whether the judgment-roll has been made up or not.<sup>34</sup> Every process which may be required to completely enforce a judgment must be taken within five years after its entry.<sup>35</sup> It applies as well to justices' judgments;<sup>36</sup> and to judgments of

<sup>27</sup> *Egery v. Buchanan*, 5 Cal. 56; compare *Snyder v. Clark*, 100 id. 414; *Raker v. Bucher*, id. 214.

<sup>28</sup> *Ritter v. Scannell*, 11 Cal. 248.

<sup>29</sup> *Joyce v. Joyce*, 5 Cal. 449; *Rowley v. Howard*, 23 id. 401.

<sup>30</sup> *Sanchez v. Carriaga*, 31 Cal. 170. Undertaking to stay execution. See *McMillan v. Hayward*, 84 Cal. 85; *Frevert v. Swift*, 19 Nev. 400. When a judgment may be stayed by appeal. See Cal. Code Civ. Pro., § 943, as amended by act of March 3, 1897.

<sup>31</sup> *Sanchez v. Carriaga*, 31 Cal. 170; see, also, *Mok. Hill, etc., Co. v. Woodbury*, 10 id. 188; *Isaac v. Swift*, id. 71; 70 Am. Dec. 698; *Farmer v. Rogers*, 10 Cal. 335; *Logan v. Hillegass*, 16 id. 200; *Mattoon v. Eder*, 6 id. 60.

<sup>32</sup> Cal. Code Civ. Pro., § 681; N. Y. Code, § 1375.

<sup>33</sup> *Hastings v. Cunningham*, 39 Cal. 137.

<sup>34</sup> *Sharp v. Lumley*, 34 Cal. 611.

<sup>35</sup> *Bowers v. Crary*, 30 Cal. 621; see, also, *Rowe v. Blake*, 99 id. 171; *McMann v. Superior Ct.*, 74 id. 106; *Dorland v. Smith*, 93 id. 120; *Buell v. Buell*, 92 id. 393; *Dorland v. Hanson*, 81 id. 202; *Cortez v. Superior Ct.*, 86 id. 274; *Los Angeles Co. Bank v. Raynor*, 61 id. 145.

<sup>36</sup> *White v. Clark*, 8 Cal. 513.

foreclosure of mortgage equally with personal judgments;<sup>37</sup> or for an unsatisfied balance on foreclosure.<sup>38</sup> The period during which an execution has been stayed by an order of court is not to be excluded from the five years after the lapse of which an order of court was necessary to obtain an execution.<sup>39</sup>

§ 5180. **Who may issue.** The clerk can also issue execution for damages and costs.<sup>40</sup> So where a case is remitted from the Supreme Court to a District Court, the clerk of the latter may issue an execution for the costs accrued thereon, without the order of the District Court; nor can the District Court prevent the immediate execution of the judgment.<sup>41</sup>

§ 5181. **Writ, how executed.** The statute is directory, so far as it deals with the manner in which the officer is required to execute the writ;<sup>42</sup> and hence, although the failure to comply with its provisions may be sufficient cause to set the sale aside, upon the application of the parties to the writ, yet it does not render the sale void.<sup>43</sup>

<sup>37</sup> *Stout v. Macy*, 22 Cal. 647.

<sup>38</sup> *Bowers v. Crary*, 30 Cal. 621.

<sup>39</sup> *Solomon v. Maguire*, 29 Cal. 227. Suspension of the running of the statute. See *Dorland v. Hanson*, 81 Cal. 202; *Buell v. Buell*, 92 id. 393. Leave to issue execution. See *Pursel v. Deal*, 16 Oreg. 295; *Northern, etc., R. R. Co. v. Bender*, 13 Mont. 432; *Eddy v. Coldwell*, 23 Oreg. 163; 37 Am. St. Rep. 672. Issue of execution after death of judgment debtor. See *Barrett v. Furnish*, 21 Oreg. 17; *Bower v. Holladay*, 18 id. 491; *Weaver v. Pickard*, 7 Utah, 296. Execution can not issue pending an appeal. *McCoy v. Wilson*, 8 Col. 335.

<sup>40</sup> *McMillan v. Vischer*, 14 Cal. 232. The issuing of an execution is not such an act as requires the direct agency of the attorney in the case, but may be ordered by the plaintiff himself. *Jones v. Spears*, 56 Cal. 163. Execution may be directed to the sheriff or to any constable in the county. *Ross v. Wellman*, 102 Cal. 1. It should issue to the officer who has seized goods under a writ of attachment. *Pecotte v. Oliver*, 2 Idaho, 230. The fact that the execution was directed to a constable, and the return thereof shows that it was received and executed by the sheriff, is at the most an irregularity, and does not render the service void. *Ross v. Wellman*, 102 Cal. 1.

<sup>41</sup> *City of Marysville v. Buchanan*, 3 Cal. 213. See, as to issuance in another county, *People v. Doe*, 31 Cal. 220.

<sup>42</sup> *Smith v. Randall*, 6 Cal. 50; 65 Am. Dec. 475; *Webber v. Cox*, 6 Mont. 110; *Hayden v. Dunlap*, 3 Bibb, 216.

<sup>43</sup> *San Francisco v. Pixley*, 21 Cal. 59; *Blood v. Light*, 38 id. 649; 99 Am. Dec. 441; see Cal. Code Civ. Pro., § 691.

§ 5182. **Exemption from execution a personal right.** The exemption of property from sale on execution is a personal right, which the debtor may waive or claim at his election.<sup>44</sup>

§ 5183. **Household furniture.** The fact that the number of beds claimed — six in all — is greater than is required for the immediate and constant use of the family is no objection. Such a construction of the statute would be too narrow.<sup>45</sup>

§ 5184. **Life insurance policy.** The party claiming that a life insurance policy, under the statute of this state, is exempt from execution, must show that the policy was issued by a company incorporated under the laws of this state, and that the benefits which he expects to derive from the policy are such as might have been secured by the payment of an annual premium not exceeding five hundred dollars.<sup>46</sup> And an endowment policy is an insurance on life, within the sense of the statute. Under the California Code of Civil Procedure, section 690, subdivision 10, as amended in 1877-8, the exemption applies to policies in all life insurance companies, whether incorporated under the laws of this state or not, if the annual premiums do not exceed five hundred dollars.

§ 5185. **Teams, teamsters, etc.** A teamster in the sense of the statute is one engaged in the business of teaming or hauling freight for other persons for a consideration, by which he habitually supports himself and family, if he has one. While he need not drive his team in person, he must be personally engaged in the business, and for the purpose of making a living. One who occupies his time in some other business or calling, and purchases a team and also carries on the business of teaming by the employment of others, is not a teamster in the sense of the statute.<sup>47</sup> The horses, etc., exempt to a farmer do not include a stallion kept for the service of mares.<sup>48</sup> But a wagon

<sup>44</sup> *Borland v. O'Neal*, 22 Cal. 504; *Stanton v. French*, 83 id. 194. As to what property is exempt from execution, see Cal. Code Civ. Pro., § 690, as amended by act of March 27, 1897; and also as to exemption of homestead, Cal. Code Civ. Pro., § 1240.

<sup>45</sup> *Haswell v. Parsons*, 15 Cal. 266; 76 Am. Dec. 480. As to when exemption may be claimed, *Id.*; see Cal. Code Civ. Pro., § 690, subd. 2.

<sup>46</sup> *Briggs v. McCullough*, 36 Cal. 542.

<sup>47</sup> *Brusie v. Griffith*, 34 Cal. 306.

<sup>48</sup> *Robert v. Adams*, 38 Cal. 383; 90 Am. Dec. 413.

and horses which are exemptare none the less so because the debtor owns an undivided interest in common with a stranger.<sup>49</sup>

§ 5186. **Property in third person — estate in land.** The purchaser of real estate at execution sale, both before and after the period for redemption expires, has an estate in the land purchased, which may be levied on and sold on an execution running against his property.<sup>50</sup>

§ 5187. **Joint property.** Where the execution debtor owns property jointly with another, a sheriff, who has such execution, has the right to levy on such property, and take it into possession for the purpose of subjecting it to sale.<sup>51</sup>

§ 5188. **Liability of sheriff.** Where a sheriff or constable seizes the property of one man under an execution against another, he is a trespasser, and liable on his official bond.<sup>52</sup>

§ 5189. **Money in bank.** Where negotiable certificates of deposit have been issued to the depositor, there is nothing left in the possession of the bankers belonging to the depositor upon which an attachment issued against his property can fasten.<sup>53</sup>

§ 5190. **Pledgee.** While the interest of the pledgor may be reached under an execution, it can only be done by serving a garnishment on the pledgee, and not by a seizure of the pledge.<sup>54</sup>

§ 5191. **Property in custody of the law.** Property in the custody of the law is not liable to seizure without an order from the court having charge thereof.<sup>55</sup> A sheriff can not levy upon

<sup>49</sup> *Servantl v. Lusk*, 43 Cal. 238.

<sup>50</sup> *Page v. Rogers*, 31 Cal. 293. See, as to levy on pre-emption claim, *Kenyon v. Quinn*, 41 Cal. 325.

<sup>51</sup> *Waldman v. Broder*, 10 Cal. 378; see *Veach v. Adams*, 51 id. 609. As to property not segregated, see *Adams v. Gorham*, 6 Cal. 68; see, also, *Bernal v. Hovious*, 17 id. 542; 79 Am. Dec. 147; *Jones v. Thompson*, 12 Cal. 196. Cases where title to property was held to be in third person by assignment and otherwise. See *Swanston v. Sublette*, 1 Cal. 123; *Bryan v. Sharp*, 4 id. 351; *Eldridge v. See Yup Co.*, 17 id. 44; *Peterie v. Bugbey*, 24 id. 423.

<sup>52</sup> *Van Pelt v. Littler*, 14 Cal. 194; 30 id. 190; *Markley v. Rand*, 12 id. 275.

<sup>53</sup> *McMillan v. Richards*, 9 Cal. 365; 70 Am. Dec. 665.

<sup>54</sup> *Treadwell v. Davis*, 34 Cal. 691; see *Williams v. Yallick*, 11 Oreg. 337.

<sup>55</sup> *County of Yuba v. Adams*, 7 Cal. 35.

money in his own hands belonging to the judgment debtor, when he has received the money on an execution in favor of this debtor.<sup>56</sup> But, it seems, funds in the hands of a receiver, in a suit for dissolution, are subject to attachment at any time before a final decree of dissolution and distribution.<sup>57</sup>

§ 5192. **Property which may and may not be levied on— choses in action.** Things in action are such property as may be levied upon on execution.<sup>58</sup>

§ 5193. **Coin.** Coin held in the hand, like a horse held by the bridle, may be levied upon.<sup>59</sup>

§ 5194. **Counties, suits against.** An execution levied upon a county's revenues in the hands of the treasurer is illegal and void.<sup>60</sup> The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county.<sup>61</sup>

§ 5195. **Contingent interests.** Contingent and complicated contracts can not be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy, and announced at the sale.<sup>62</sup>

§ 5196. **Firm property.** The interest of one partner in the partnership chattels is the subject of levy and sale by the sheriff, on an execution against one of the partners.<sup>63</sup> But the interest which passes by the sale is only the interest of the debtor partner in the residuum of the partnership property, after the settlement of the partnership debts.<sup>64</sup> The fact that an individual creditor obtains judgment, issues execution, and levies on

<sup>56</sup> *Clymer v. Willis*, 3 Cal. 363; 58 Am. Dec. 414.

<sup>57</sup> *Adams v. Woods*, 9 Cal. 24.

<sup>58</sup> *Adams v. Hackett*, 7 Cal. 187; *Davis v. Mitchell*, 34 id. 81; see, also, *Donohoe v. Gamble*, 38 id. 340; 99 Am. Dec. 399; and *Crandall v. Blen*, 13 Cal. 15.

<sup>59</sup> *Green v. Palmer*, 15 Cal. 411; 76 Am. Dec. 492.

<sup>60</sup> *Gilman v. Contra Costa County*, 8 Cal. 52; 68 Am. Dec. 290.

<sup>61</sup> *Emeric v. Gilman*, 10 Cal. 404; 70 Am. Dec. 742.

<sup>62</sup> *Crandall v. Blen*, 13 Cal. 15.

<sup>63</sup> *Jones v. Thompson*, 12 Cal. 191. Levy of execution against member of firm. See *Wright v. Ward*, 65 Cal. 525.

<sup>64</sup> *Robinson v. Tevis*, 38 Cal. 611.

firm property, gives him no right to the property, as against firm creditors who have not yet obtained judgment.<sup>65</sup> But the sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein.<sup>66</sup>

§ 5197. **Franchises.** A ferry license, being a franchise, is not the subject of levy and sale under execution.<sup>67</sup> Now, by the California Civil Code, section 388, the franchise of a corporation is subject to execution, though formerly it was not.<sup>68</sup>

§ 5198. **Mining interest.** The interest of a miner in his mining claim is property, and may be taken and sold under execution.<sup>69</sup> The interest of a mortgagor in a mining claim is liable to attachment and sale under execution, and the purchaser acquires the right of possession as against the mortgagee until foreclosure.<sup>70</sup>

§ 5199. **Promissory note.** A promissory note is liable to seizure and sale under execution against the holder and payee. By such a sale, the purchaser takes the note upon the same terms upon which he would have taken it had it come into his hands in the ordinary course of business.<sup>71</sup>

§ 5200. **Sale under execution, how conducted.** All sales of property under execution must be made at auction to the high-

<sup>65</sup> Conroy v. Woods, 13 Cal. 631; 73 Am. Dec. 605.

<sup>66</sup> Jones v. Thompson, 12 Cal. 191.

<sup>67</sup> Thomas v. Armstrong, 7 Cal. 286.

<sup>68</sup> See Wood v. Truckee Turnpike Co., 24 Cal. 474; Gregory v. Blanchard, 98 id. 311. Levy of execution on a judgment. See McBride v. Fallon, 65 Cal. 301; Latham v. Blake, 77 id. 646; McLaughlin v. Alexander, 28. Dak. 226; on patent right to invention. Pacific Bank v. Robinson, 57 Cal. 520; broker's seat in stock and exchange board. Habenicht v. Lissak, 78 Cal. 351; Lowenberg v. Greenebaum, 99 id. 162; legal or equitable interest in land. Fish v. Fowlie, 58 Cal. 373; Leroy v. Dunkerly, 54 id. 452; Calhoun v. Leary, 6 Wash. St. 17; property or funds of private corporation. Hughes v. Railway Co., 11 Oreg. 158. Exemption from execution of homesteads on public lands. Faull v. Cooke, 19 Oreg. 455; 20 Am. St. Rep. 836; National Bank v. Riley, 29 Oreg. 289. A notice of claim of exemption from execution signed by two persons is sufficient as a claim for either separately. Stanton v. French, 83 Cal. 194. As to manner of sale and redemption, etc., see Cal. Civil Code, §§ 388-393.

<sup>69</sup> McKeon v. Bisbee, 9 Cal. 137; 70 Am. Dec. 642.

<sup>70</sup> Halsey v. Martin, 22 Cal. 645.

<sup>71</sup> Davis v. Mitchell, 34 Cal. 81.



est bidder, and shall be made between the hours of nine in the morning and five in the afternoon; after sufficient property has been sold to satisfy execution, no more can be sold.<sup>72</sup>

**§ 5201. Notice of sale.** Before the sale of property in execution, notice thereof must be given by the sheriff.<sup>73</sup> Although the officer neglects to give the notice, the sale shall not be void.<sup>74</sup> But the officer shall in that event forfeit five hundred dollars to the aggrieved party, in addition to his actual damages.<sup>75</sup>

**§ 5202. Order of sale must issue.** A sheriff has no authority to make sale of mortgaged premises under a judgment of foreclosure and sale, unless an order of sale is issued upon the judgment and placed in his hands.<sup>76</sup> If the first order of sale on a foreclosure decree be not executed, a second order may issue,<sup>77</sup> or an execution may issue on personal property of defendant, where a personal judgment is also taken.<sup>78</sup> A sheriff's bill of sale of personal property sold on execution need not contain all the formalities of a regular certificate.<sup>79</sup>

**§ 5203. Real property, certificate of sale.** The officer shall give to the purchaser a certificate of the sale, containing: 1.

<sup>72</sup> Cal. Code Civ. Pro., § 694; *Smith v. Randall*, 6 Cal. 47; 65 Am. Dec. 475; *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515. As to sale in mass of real estate being void, *San Francisco v. Pixley*, 21 id. 56.

<sup>73</sup> As to form and sufficiency of notice, see Cal. Code Civ. Pro., § 692.

<sup>74</sup> *Smith v. Randall*, 6 Cal. 47; 65 Am. Dec. 475; *Harvey v. Fisk*, 9 Cal. 98; *Frink v. Roe*, 70 id. 296.

<sup>75</sup> Cal. Code Civ. Pro., § 693; see *Askew v. Ebberts*, 22 Cal. 263; *Raker v. Bucher*, 100 id. 214. Publication of the notice. See *Investment Trust v. Cadman*, 101 Cal. 200. A sale by a sheriff under an execution after the return day of the execution is valid if he has made a levy during the lifetime of the writ, and a sale may likewise be made after the return day of a writ issued under an order of sale, where no levy is required. *Lumber Co. v. Hotel Co.*, 94 Cal. 217.

<sup>76</sup> *Heyman v. Babcock*, 30 Cal. 367.

<sup>77</sup> *Shores v. Scott River Water Co.*, 17 Cal. 626.

<sup>78</sup> *Englund v. Lewis*, 25 Cal. 357. That a personal judgment may be entered in connection with the decree, see *Comerals v. Genella*, 22 Cal. 116. As to delivery of personal property, see Cal. Code Civ. Pro., §§ 698 and 699. Assignment of judgment under sheriff's sale. *Fore v. Manlove*, 18 Cal. 436. Duty of ex-sheriff, and in case of his death, see *People v. Boring*, 8 Cal. 406; 68 Am. Dec. 331.

<sup>79</sup> *Lay v. Neville*, 25 Cal. 551.



A particular description of the real property sold; 2. The price bid for each distinct lot or parcel; 3. The whole price paid; 4. When subject to redemption, it must be so stated. And when the judgment is made payable in a specific kind of money or currency, the certificate shall state the kind of money or currency in which such redemption may be made, which shall be the same as that specified in the judgment, a duplicate of which certificate shall be filed with the recorder of the county.<sup>80</sup> The purchaser is substituted to, and acquires all the right, title, interest, and claim of the judgment debtor thereto; and when the estate is less than a leasehold of two years' unexpired term, the sale is absolute. In other cases it is subject to redemption.<sup>81</sup>

**§ 5204. Resale of property.** If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property, at any time, to the highest bidder, and if any loss be occasioned thereby the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction. Where the judgment creditor becomes the purchaser, and refuses to pay it, it is error for the court to order a satisfaction of the judgment.<sup>82</sup>

**§ 5205. Reversal on appeal, effect of.** A judgment unreversed and not suspended may be enforced, but when reversed it is as if never rendered; and money collected by authority of it may, as a general rule, be recovered back;<sup>83</sup> and property or advantages must be restored.<sup>84</sup>

<sup>80</sup> Cal. Code Civ. Pro., § 700.

<sup>81</sup> Id.; see *Moore v. Martin*, 38 Cal. 428; *McMillan v. Richards*, 9 id. 365; 70 Am. Dec. 655; *Cloud v. El Dorado Co.*, 12 Cal. 128; 73 Am. Dec. 526; *Clark v. Lockwood*, 21 Cal. 220; *People v. Doe*, 31 id. 220; *Page v. Rogers*, id. 293; *People v. Mayhew*, 26 id. 655; *Baber v. McLellan*, 30 id. 135; *Steinbach v. Leese*, 27 id. 297; see, also, *Bickerstaff v. Doub*, 19 id. 109; 79 Am. Dec. 204.

<sup>82</sup> *Sweeney v. Hawthorne*, 6 Nev. 129; Cal. Code Civ. Pro., § 695. As to rights of purchaser, see *People v. Hays*, 5 Cal. 66; *Williams v. Smith*, 6 id. 91; *Harvey v. Flisk*, 9 id. 93. For equitable relief, see *Goodenow v. Ewer*, 16 Cal. 461; 76 Am. Dec. 540; *Webster v. Haworth*, 8 Cal. 21. As to the doctrine of *caveat emptor*, see *Boggs v. Hargrave*, 16 Cal. 559; *Webster v. Haworth*, 8 id. 21; see, also, *Johns v. Trick*, 22 id. 511.

<sup>83</sup> *Raun v. Reynolds*, 18 Cal. 275.

<sup>84</sup> *Reynolds v. Harris*, 14 Cal. 680; 76 Am. Dec. 459. If there is no judgment in support of the writ of execution under which the

§ 5206. **Sale in parcels.** The well-established rules of equity proceedings require, in foreclosure cases, not only that the property should be sold in parcels, but that the property included in the first mortgage should be exhausted before recourse is had to the second.<sup>85</sup> Tracts levied on separately must not be sold in mass, and if so sold, the creditor may move to set aside the sale, even though a stranger becomes the purchaser.<sup>86</sup>

§ 5207. **Setting aside sale.** The purchaser at sheriff's sale is entitled to notice of motion to set it aside, and personal service is not exhausted even if absent from the state.<sup>87</sup> Where the property sold does not belong to the judgment debtor the case comes within the provision of the California Code of Civil Procedure, section 708, and the judgment may be revived.<sup>88</sup>

§ 5208. **Sheriff's deed.** If no redemption be made within six months after the sale, the purchaser or his assignee is entitled to a conveyance; or if so redeemed, whenever sixty days have

sheriff makes the sale the power to make the sale is wanting, and no title to the property passes, even to an innocent purchaser. *Bullard v. McArdle*, 98 Cal. 355; and see *Reynolds v. Lincoln*, 71 id. 183. But execution sale under a judgment entered after affirmance of judgment rendered upon a premature and ineffectual appeal is valid, and passes title. *Brady v. Burke*, 90 Cal. 1. A judgment debtor can not waive the right of his vendee to object to a sale of his property under a void execution. *Dorland v. Smith*, 93 Cal. 120.

<sup>85</sup> *Raun v. Reynolds*, 11 Cal. 14.

<sup>86</sup> *Browne v. Ferrea*, 51 Cal. 552. Sales in mass. See *Marston v. White*, 91 Cal. 37; *Gleason v. Hill*, 65 id. 17; *Riddle v. Harrell*, 71 id. 254; *Vigoureux v. Murphy*, 54 id. 346. Parol waiver of sale of land in parcels. *Hudepohl v. Mining Co.*, 94 Cal. 588. Where the right of redemption is interfered with by selling several parcels in a lump, then it is the duty of the court to set aside the sale, unless the purchaser can show that no possible injury with respect to his redemption right could have resulted to the defendant by the disregard of the statute requiring sale in separate parcels. *Power v. Larabee*, 3 N. Dak. 502; and see, also, *Smith v. Huntoon*, 134 Ill. 24; *Graffman v. Burgess*, 117 U. S. 180; compare *Orton v. Brown*, 11 Cal. 561.

<sup>87</sup> *Eckstein v. Calderwood*, 34 Cal. 658; see *Power v. Larabee*, 3 N. Dak. 502. As to the rights of purchaser, on motion to set aside sale for irregularity, see Cal. Code Civ. Pro., § 708.

<sup>88</sup> *Cross v. Zane*, 47 Cal. 602. As to the revival of judgments and proceedings therefor, see *Humiston v. Smith*, 21 Cal. 129; *Hitchcock v. Caruthers*, 100 id. 100; consult, also, *Boggs v. Hargrave*, 16 id. 566; and *Burton v. Lies*, 21 id. 88; § 4763, *ante*.

elapsed, and no other redemption has been made, and notice thereof given, and the time for redemption has expired, the last redemptioner, or his assignee, is entitled to a sheriff's deed. If the debtor redeem at any time before the time for redemption expires, the effect of the sale shall be terminated, and he is restored to his estate.<sup>89</sup> A deed executed by the sheriff immediately after the sale, without waiting the statutory time, is void.<sup>90</sup> Sheriff's deed need not recite the judgment and execution under which he acted; it is sufficient if it recites enough to show the authority of the sheriff to sell.<sup>91</sup>

§ 5209. **Title acquired by sale.** The statute of California, in providing that until a levy property shall not be affected by the execution,<sup>92</sup> has gone further than the English statute, and has entirely obviated the evils of the common-law rule.<sup>93</sup> So in the case of personal property, the title transferred by the sale can not antedate the day of sale, as against *bona fide* purchasers, where the seizure was made only on the day of sale;<sup>94</sup> so in case of land, the title dates from the docketing of judgment as against third persons, and not from the date of any real or pretended statutory levy.<sup>95</sup> A mortgagor, after the sale, has the right to

<sup>89</sup> Cal. Code Civ. Pro., § 703, as amended by act of 1895.

<sup>90</sup> *Gross v. Fowler*, 21 Cal. 392; *Bernal v. Gleim*, 33 id. 668; *Perham v. Kuper*, 61 id. 331.

<sup>91</sup> *Clark v. Sawyer*, 48 Cal. 133; *Montgomery v. Robinson*, 49 id. 258. As to effect of sheriff's deeds and certificates of sale, see the following cases: *Anthony v. Wessel*, 9 Cal. 103; *Knight v. Fair*, id. 117; *Tuolumne Redemp. Co. v. Sedgwick*, 15 id. 515; *McCarty v. Christie*, 13 id. 81; *Lewes v. Thompson*, 3 id. 266; *Mills v. Sukey*, 22 id. 373; 83 Am. Dec. 74; *Donahue v. McNulty*, 24 Cal. 411; 85 Am. Dec. 78; *People v. Doe*, 31 Cal. 220; *Hutchings v. Ebeler*, 46 id. 557; *Leonard v. Flynn*, 89 id. 543; *Miller v. Luco*, 80 id. 257. A sheriff's deed, executed in pursuance of an execution sale under a judgment in an attachment suit, takes effect from the date of the attachment if the levy was such as to create a lien. *Riley v. Nance*, 97 Cal. 203. A recital in a sheriff's deed, given to the execution purchaser, "that there had been no redemption from the sale," is not conclusive upon a grantee of the judgment debtor who had made a valid redemption. The grantee may attack such deed in an action of ejectment, without resorting to equity to have it set aside. *Phillips v. Hogart*, 118 Cal. 552.

<sup>92</sup> Cal. Code Civ. Pro., § 688.

<sup>93</sup> *Blood v. Light*, 38 Cal. 657; 99 Am. Dec. 441.

<sup>94</sup> *Allentown Bank v. Beck*, 49 Penn. St. 409.

<sup>95</sup> *Blood v. Light*, 38 Cal. 657; 99 Am. Dec. 441.

the use and possession of the mortgaged premises until the execution of the sheriff's deed; but no right to despoil the property of its fixtures. The deed of the sheriff takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor;<sup>96</sup> such as the engine and boilers, etc., used in a flour-mill.<sup>97</sup>

**§ 5210. Title, character of.** The purchaser of a judgment on sale under execution and levy takes as assignee only, assuming that a judgment is the subject of levy and sale. The sheriff's sale of a judgment passes no title other than would pass by an assignment by the owner.<sup>98</sup>

**§ 5211. Title, on what it depends.** The purchaser's title in no respect depends upon the return, but upon the judgment, sale, and deed.<sup>99</sup> The title of a purchaser, under a sale on a decree of foreclosure, can not be impeached in a collateral action for irregularity in the proceedings on the sale.<sup>100</sup>

**§ 5212. Redemption after sale — payments, how made.** The payment in case of redemption may be made to the purchaser or redemptioner, or for him to the officer who made the sale, when the judgment has been made payable in a specified kind of money or currency; and a tender of the money is equivalent to payment.<sup>101</sup> Payment can not be made in certified checks.<sup>102</sup> Where a particular currency is not specified, legal-tender notes are sufficient.<sup>103</sup>

<sup>96</sup> *Sands v. Pfeiffer*, 10 Cal. 258.

<sup>97</sup> *Id.*

<sup>98</sup> *Fore v. Manlove*, 18 Cal. 436.

<sup>99</sup> *Cloud v. El Dorado Co.*, 12 Cal. 128; 73 Am. Dec. 526; *Clarke v. Lockwood*, 21 Cal. 220; *More v. Martin*, 38 id. 428; and consult as to title acquired by purchaser, *Breeze v. Brooks*, 71 Cal. 169; *Frink v. Roe*, 70 id. 296; *Blakeman v. Iron Co.*, 72 id. 321; *Bullard v. McArdle*, 98 id. 355; *Hibberd v. Smith*, 67 id. 547; *Eltzroth v. Ryan*, 89 id. 135; *Los Angeles Co. Bank v. Raynor*, 61 id. 145; *Wilson v. Madison*, 55 id. 5. During the period of redemption, the dry, naked, legal title remains in the judgment debtor, with a legal authority vested in the sheriff to divest it, at the expiration of the redemption period, by executing a deed to the purchaser. *Wood v. Conrad*, 2 S. Dak. 405.

<sup>100</sup> *Nagle v. Macy*, 9 Cal. 426; consult *Hayes v. Shattuck*, 21 id. 51; *Boggs v. Hargrave*, 16 id. 566; *Burton v. Lies*, 21 id. 88.

<sup>101</sup> Cal. Code Civ. Pro., § 704.

<sup>102</sup> *People v. Hays*, 4 Cal. 127.

<sup>103</sup> *People v. Mayhew*, 26 Cal. 655. As to who may receive re-

§ 5213. **Proceedings on redemption.** The redemptioner must produce a copy of the docket of judgment, certified by the clerk; or a note of the record of a mortgage or lien certified by the recorder;<sup>104</sup> and if an assignee, a copy of the assignment necessary to establish his claim,<sup>105</sup> and an affidavit by himself or his agent, showing the amount then actually due on the lien.<sup>106</sup> But these requirements do not apply to the judgment debtor; he may redeem without the production of such credentials;<sup>107</sup> and during the time for redemption the court may restrain waste.<sup>108</sup>

§ 5214. **Sale of equity of redemption.** The sale of the equity of redemption of mortgaged premises, and assignment of the rents thereof, until foreclosure and sale, to a creditor, can not operate as a fraud upon the mortgagee, whose rights are secured, and may be enforced by a foreclosure.<sup>109</sup>

§ 5215. **Redemption, how effected.** The judgment debtor or redemptioner may redeem the property from the purchaser at any time within twelve months after the sale, on paying the purchaser the amount of his purchase, with one per cent. per month thereon in addition, up to the time of redemption, together with the amount of any assessment or taxes which the purchaser may have paid thereon after purchase, and interest

demption money, see *People v. Boring*, 8 Cal. 406; 68 Am. Dec. 331; *Baber v. McLellan*, 30 Cal. 135; *People v. Mayhew*, 26 id. 655.

<sup>104</sup> Cal. Code Civ. Pro., § 705, subd. 1; *Haskell v. Manlove*, 14 Cal. 54.

<sup>105</sup> Id., subd. 2; *Reynolds v. Harris*, 14 Cal. 667; 76 Am. Dec. 459.

<sup>106</sup> Id., subd. 3.

<sup>107</sup> *Yoakum v. Bower*, 51 Cal. 539.

<sup>108</sup> Cal. Code Civ. Pro., § 706. As to the rents and profits intermediate the sale and final redemption, see Cal. Code Civ. Pro., § 707; *Guy v. Middleton*, 5 Cal. 392; *Reynolds v. Lathrop*, 7 id. 43; *McDevitt v. Sullivan*, 8 id. 592; *Harris v. Reynolds*, 13 id. 514; 73 Am. Dec. 600; *Kelsey v. Abbott*, 13 Cal. 609; *Knight v. Truett*, 18 id. 113; *Kline v. Chase*, 17 id. 596; *Whitney v. Allen*, 21 id. 233; *Shores v. Scott River Co.*, id. 135; *Henry v. Evarts*, 30 id. 425; *Mayo v. Woods*, 31 id. 269; *Page v. Rogers*, id. 293; see, also, *Frink v. Le Roy*, 49 id. 315; *Walker v. McCusker*, 71 id. 594; *Clement v. Shipley*, 2 N. Dak. 430.

<sup>109</sup> *Dewey v. Latson*, 6 Cal. 609. As to relative rights of parties thereunder, consult *Montgomery v. Tutt*, 11 Cal. 307; *McMillan v. Richards*, 9 id. 365; 70 Am. Dec. 655; *McDermott v. Burke*, 16 Cal. 580; *Harlan v. Smith*, 6 id. 173; *Cowing v. Rogers*, 34 id. 648; *Goode now v. Ewer*, 16 id. 461; 76 Am. Dec. 540; *Alexander v. Greenwood*, 24 id. 506; *Bludworth v. Lake*, 33 id. 255, 265.

on such amount. And if the purchaser be also a creditor, having a prior lien to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest.<sup>110</sup>

§ 5216. **Subsequent redemption.** If property be so redeemed by a redemptioner, another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner, on paying the sum paid on such last redemption, with two per cent. thereon in addition, and the amount of any assessment or taxes which the last redemptioner may have paid thereon after the redemption by him, with interest on such amount, and in addition the amount of any liens held by said last redemptioner prior to his own, with interest. The property may be successively redeemed as often as a redemptioner is so disposed, on the above terms. Notice of redemption shall be given to the sheriff.<sup>111</sup> If a redemptioner redeem, and no redemption be made from him within sixty days, his right to the sheriff's deed is absolute.<sup>112</sup>

§ 5217. **Who may redeem.** Property sold subject to redemption, or any part sold separately, may be redeemed in the manner provided, by the following persons, or their successors in interest: 1. The judgment debtor, or his successor in interest, in the whole or any other part of the property; 2. A creditor, having lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold. The persons mentioned in the second subdivision of this section are, in this chapter, termed redemptioners.<sup>113</sup> The judgment debtor may redeem from an

<sup>110</sup> Cal. Code Civ. Pro., § 702, as amended 1895 and 1897. Months as used in the statute defined. *Gross v. Fowler*, 21 Cal. 392. As to taxes, see *Seale v. Doane*, 17 Cal. 476. As to interest, see *McMillan v. Vischer*, 14 Cal. 232; *Kirkham v. Dupont*, id. 559. Estate, in whom vested. *McMillan v. Richards*, 9 id. 365; 70 Am. Dec. 655; *Anthony v. Wessels*, 9 Cal. 103. Excessive payment, not compulsory. *McMillan v. Vischer*, 14 Cal. 235. Payment of amount of prior judgment. *Campbell v. Oaks*, 68 Cal. 222.

<sup>111</sup> Cal. Code Civ. Pro., § 703, as amended 1895.

<sup>112</sup> *Boyle v. Dalton*, 44 Cal. 332.

<sup>113</sup> Cal. Code Civ. Pro., § 701; see *Phillips v. Hagart*, 113 Cal. 553. Under Oregon statute, the right to redeem is not merely a privilege personal to the debtor, but is a right of property, and subject to bargain and sale. *Rosenberg v. Croisan*, 18 Oreg. 470. The issuance by the sheriff of a certificate of redemption is not necessary to

execution sale, notwithstanding he has conveyed his interest to another in the property sold.<sup>114</sup>

**§ 5218. Undertaking of indemnity to sheriff.**

*Form No. 1167.*

Know all men by these presents, that we, J. R. as principal, and L. M. and N. O. as sureties are held and firmly bound unto R. S., sheriff of the ..... county of ....., in the sum of ..... dollars, gold coin of the United States of America, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the ..... day of ....., 18..

Whereas, under and by virtue of a writ of execution, issued out of the ..... court of the ..... county of ..... in an action wherein the said J. R. was plaintiff and C. D. was defendant, against said defendant, directed and delivered to said R. S., sheriff of the ..... county of ..... the said sheriff was commanded to satisfy the judgment in said action, with interest, out of the personal property of such defendant within his county not exempt from execution; and if sufficient personal property could not be found, then out of the real property belonging to ..... on the day when the said judgment was docketed, or at any time subsequently, the said sheriff did thereupon levy upon and take into his possession the following-described goods and chattels.

[DESCRIPTION.]

And whereas, upon the taking of the said goods and chattels by virtue of the said writ, P. Q. claimed the said goods and render effectual a redemption of real estate sold under execution. *Phillips v. Hagart*, 113 Cal. 552.

<sup>114</sup>*Yoakum v. Bower*, 51 Cal. 540. Statute defined. *Guy v. Middleton*, 5 Cal. 392; *Seale v. Mitchell*, id. 401; *Tuol. Redemp. Co. v. Sedgwick*, 15 id. 515; *McMillan v. Richards*, 9 id. 365; 70 Am. Dec. 655. As to rights of redemption, see *Raun v. Reynolds*, 11 Cal. 20; *Montgomery v. Tutt*, id. 317; *Frink v. Murphy*, 21 id. 108; 81 Am. Dec. 149; *Grattan v. Wiggins*, 23 Cal. 16; *People v. Mayhew*, 26 id. 655; *Whitney v. Higgins*, 10 id. 547; 70 Am. Dec. 748; *Gamble v. Voll*, 15 Cal. 510; *Daubenspeck v. Platt*, 22 id. 330; and see Cal. Code Civ. Pro., §§ 702, 703, as amended by acts of 1895 and 1897.



chattels as his property, and thereupon a jury was summoned by the said sheriff to try such claim, which said jury have by their finding decided in favor of said claimant.

And whereas, the said plaintiff, notwithstanding such finding, requires of said sheriff that he shall retain said property under such levy and in his custody:

Now, therefore, the condition of this obligation is such, that if the said L. M. and N. O., their heirs, executors, and administrators, shall well and truly indemnify and save harmless the said sheriff, his heirs, executors, administrators, and assigns, of and from all damages, expenses, costs, and charges, and against all loss and liability which he, the said sheriff, his heirs, executors, administrators, or assigns, shall sustain, or in anywise be put to, for or by reason of the levy, taking, sale, or retention by the said sheriff in his custody under said execution, of the said property claimed as aforesaid, then the above obligation to be void; otherwise to remain in full force and virtue.

[SIGNATURES AND SEALS.]

[AFFIDAVIT OF QUALIFICATION.]

§ 5219. **Proceedings.** If several creditors levy, and those prior fail to indemnify the sheriff, he should relinquish the levy of such, and proceed only for the benefit of those who indemnify and incur the responsibility.<sup>115</sup> An agreement to indemnify a sheriff for seizing property under execution is valid, if the parties are in good faith seeking to enforce a legal right.<sup>116</sup> In a suit against the sheriff for not levying the execution, if the sheriff prove a trial by jury and verdict for claimant, the plaintiff must show that he tendered the bond of indemnity to the sheriff required by law.<sup>117</sup>

§ 5220. **Verdict, effect of.** A sheriff is not protected in the sale of personal property by the verdict of a jury on the trial of the right of property, under the provisions of section 218 of the Code.<sup>118</sup> The proceedings before a sheriff in such a trial are not judicial.<sup>119</sup>

<sup>115</sup> Davidson v. Dallas, 8 Cal. 227.

<sup>116</sup> Stark v. Raney, 18 Cal. 622.

<sup>117</sup> Strong v. Patterson, 6 Cal. 156; see Cal. Code Civ. Pro., § 689.

<sup>118</sup> Cal. Code Civ. Pro., § 689. A sheriff who sells personal property under execution, which is immediately taken possession of by the purchaser, is only liable, upon such sale being set aside, for his failure to retake the property. Orton v. Brown, 113 Cal. 561.

<sup>119</sup> Perkins v. Thornburgh, 10 Cal. 189; Sheldon v. Loomis, 28 id. 122.



## § 5221. Writ of possession.

*Form No. 1168.*

## [TITLE.]

The people of the State of California, to the sheriff of the county of ....., greeting:

Whereas, on the ..... day of ....., 18.., A. B., plaintiff, recovered a judgment in the said Superior Court of the state of ..... in and for the said county of ....., against C. D., defendant, for the possession of certain premises in said judgment and decree and herein-after more particularly described, and also for the sum of ..... dollars, damages for the detention of said premises, besides the sum of ..... dollars, costs and disbursements, as appears to us of record.

And whereas, the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court, in the said county of ....., and the said judgment was docketed in said clerk's office, in the said ..... county, on the day and year first above written:

Now, therefore, you, the said sheriff, are hereby commanded and required to place the said A. B. in the quiet and peaceable possession of the lands and premises in said judgment and decree described, as follows, to-wit:

## [DESCRIPTION.]

And whereas, the sums of ..... dollars, damages, and ..... dollars, costs, are now (at the date of this writ) actually due on said judgment:

You, the said sheriff, are hereby further required to make the said sums due on the said judgment, for damages and costs, and all accruing costs, to satisfy the said judgment, out of the ..... personal property of said debtor, C. D., or if sufficient personal property of said debtor can not be found, then out of the real property in your county belonging to him on the day whereon said judgment was docketed in the said ..... county or at any time thereafter; and make return of this writ within ..... days after your receipt hereof, with what you have done indorsed hereon.

Witness, Hon. ....., judge of the said Superior Court, at the courthouse in the said county of ..... and the seal of said court, this ..... day of ....., 18..

[SEAL.]

[SIGNATURE OF CLERK.]<sup>120</sup>

<sup>120</sup> Where L. and P. entered into possession of certain lands under

## § 5222. Order for writ of assistance.

*Form No. 1169.*

[TITLE.]

On reading and filing the affidavit of P. Q., setting forth that he was the purchaser of the premises described in the complaint herein; that he has presented to the defendant C. D. the sheriff's deed for said property, and demanded possession thereof, and that said C. D. has refused to deliver to him possession of said premises, and it appearing that due notice has been given of this motion to Messrs. . . . ., the attorneys of said defendant; now, on motion of . . . . ., on behalf of said P. Q., it is ordered that a writ of assistance issue to the sheriff of . . . . . county, to put the said P. Q. in possession of the said premises, and him in the possession thereof from time to time to maintain and defend.

## § 5223. Writ of assistance.

*Form No. 1170.*

[TITLE.]

The people of the State of California, to the sheriff of the . . . . . county of . . . . ., greeting:

Whereas, by a certain decree or judgment of our Superior Court of the state of . . . . . in and for the said county of . . . . ., in a certain action there pending between A. B., plaintiff, and C. D., defendant, made at a term of said court, held at . . . . ., in the said county of . . . . ., on the . . . . . day of . . . . ., 18... in and for the said county of . . . . ., before the Hon. . . . ., judge of the said court, it was, among other things therein contained, adjudged and decreed by the said court that the purchaser at the sale therein described should, on the production of the sheriff's deed for said premises, be forthwith put in possession of a certain piece or parcel of land situate in the said . . . . . county of . . . . ., state of . . . . . and therein described as follows, to-wit [describe premises].

And whereas, time for redemption has expired, and the said sheriff's deed has been duly executed and delivered to C. L., who was the purchaser at said sale, yet the said C. L. has not

neither of the parties to an action for the possession of the same, and were not parties to said action, they can not be dispossessed under a writ issued on a judgment rendered for plaintiff therein. *Rogers v. Parish*, 35 Cal. 127; *Mayo v. Sprout*, 45 Id. 99.

been let into nor taken possession of the said piece of land, or of any part thereof, according to the tenor of the said decree.

And whereas, the said piece of land is in the tenure and occupation of R. D. And whereas, by an order of said court made in the said action on the ..... day of ....., 18.., it was ordered that our writ of assistance should issue to you, the said sheriff, to put the said C. L. in possession of the said piece or parcel of land, and him in possession thereof from time to time to maintain and defend:

Therefore, we command you, that immediately after receiving this writ, you go to and enter upon the said piece or parcel of land, and that you eject and remove therefrom all and every person or persons holding or detaining the same, or any part thereof, against the said C. L., and that you put and place the said C. L. or his assigns in the full, peaceable, and quiet possession of the said piece or parcel of land, without delay, and him, the said C. L., in such possession thereof from time to time maintain, keep, and defend, or cause to be kept, maintained, and defended, according to the tenor and true intent of the said decree and order of the said court.

Witness, Hon. ...., judge of the said Superior Court, at ....., in the said county of ....., and the seal of said court, this ..... day of ....., 18..

R. S., Clerk.

By N. O., Deputy Clerk.

[SEAL.]

§ 5224. **Against whom issued.** A writ of assistance can only issue against the defendants in the suit, and parties holding under them who are bound by the decree.<sup>121</sup> *Prima facie*, all who come into possession of the land pending the action to recover possession must go out under the writ of possession, if the plaintiff recovers, for the presumption is that they came in under the defendant.<sup>122</sup> If the defendant, pending an action against him to recover possession of land, colludes with another person to obtain judgment against him for possession, and to be placed in possession by a writ of restitution, such other person

<sup>121</sup> *Burton v. Lies*, 21 Cal. 87. Consult on this subject, *Harlan v. Rackerby*, 24 Cal. 561; *Sampson v. Ohleyer*, 22 id. 200; *Skinner v. Beatty*, 16 id. 156; *S. B. L. A. v. Christy*, 41 id. 501.

<sup>122</sup> *Wetherbee v. Dunn*, 36 Cal. 147; 95 Am. Dec. 166; *Leese v. Clark*, 29 Cal. 664.

must go out under a writ of possession against the defendant. He will not be protected by his judgment, if it was collusively obtained.<sup>123</sup> If the court, in an action to foreclose a mortgage, does not acquire jurisdiction of the person owning the land at the time of the foreclosure, a writ of assistance against the owner or his grantees will be refused.<sup>124</sup>

§ 5225. **Object of writ.** A writ of assistance is the appropriate remedy to place the purchaser of mortgaged premises, under a decree of foreclosure, in possession, after he has obtained the sheriff's deed.<sup>125</sup> On a motion for a writ of assistance, questions of equitable cognizance between the parties in possession of the land who were not parties to the foreclosure suit, and the plaintiff, as to their respective rights, can not be litigated.<sup>126</sup> In executing the writ, it is the duty of the sheriff to place the purchaser of an estate in common in possession of every part of the land jointly with the other tenants in common. But he can not remove any tenant in common who holds title from an independent source.<sup>127</sup>

§ 5226. **Power of judge to grant.** Prior to the passage of the California Act of May 18, 1861, judges of courts had no power to issue writs of assistance to place the purchaser of property sold under a decree of foreclosure in possession of the same.<sup>128</sup>

§ 5227. **Proceedings requisite.** All that is requisite to obtain a writ of assistance, as against the parties and those claiming, with notice, under them, after the commencement of the action, is to furnish to the court proper evidence of a presentation of the deed to them, and a demand of the possession, and their refusal to surrender it.<sup>129</sup> Under our system, the order to deliver possession should be first made, unless a direction to that effect is contained in the decree; and if, upon its service, that is disregarded, the court can at once direct the writ to issue. If delivery of possession to the purchaser is directed by the

<sup>123</sup> *Wetherbee v. Dunn*, 36 Cal. 147; 95 Am. Dec. 166.

<sup>124</sup> *Steinbach v. Leese*, 27 Cal. 297.

<sup>125</sup> *Montgomery v. Tutt*, 11 Cal. 190; *Reynolds v. Harris*, 14 id. 677.

<sup>126</sup> *Henderson v. McTucker*, 45 Cal. 647.

<sup>127</sup> *Tevlis v. Hicks*, 38 Cal. 234.

<sup>128</sup> *Chapman v. Thornburg*, 23 Cal. 48; see, also, *People v. Doe*, 81 id. 220.

<sup>129</sup> *Montgomery v. Middlemiss*, 21 Cal. 103; 81 Am. Dec. 146.

decree, no preliminary order will be requisite; but upon proof of disobedience to the decree, the party will be entitled, as a matter of course, to the writ, as against the defendant in the suit.<sup>130</sup>

§ 5228. **Setting aside writ.** If a writ of assistance be improperly issued or executed, the court granting it can, on summary motion, set aside the writ or the service, and restore the possession.<sup>131</sup>

§ 5229. **Who entitled.** *Prima facie*, plaintiff in a foreclosure suit is entitled after sale of the premises and sheriff's deed to him to a writ of assistance, as against the mortgagor and those entering under him subsequent to the decree, if they refuse to surrender possession.<sup>132</sup> So the purchaser under a decree of foreclosure is entitled to a writ of assistance.<sup>133</sup> The writ should not issue in favor of a purchaser from the sheriff's grantee on a tax sale; it can only issue in favor of the grantee of the sheriff.<sup>134</sup> Where the sheriff's grantee holds as trustee for another party the writ should not issue in case of controversy.<sup>135</sup>

§ 5229a. **Recalling, quashing or setting aside execution.** The Superior Court has power to recall an execution which had been improperly issued after the expiration of the time allowed by law for its issuance, and to order the sheriff to refund the money collected by him thereon.<sup>136</sup> And an order may be properly made by one department of the Superior Court vacating an execution wrongfully allowed by another department of the same court.<sup>137</sup> A motion to recall an execution is a new and original proceeding, in which the moving party may employ such attorneys as he may choose to conduct it;<sup>138</sup> and the fact that the notice of the motion is signed by attorneys other than those who appeared for the judgment debtor in the original action, and that no substitution is shown, does not render the notice ille-

<sup>130</sup> *Montgomery v. Tutt*, 11 Cal. 190; *Reynolds v. Harris*, 14 id. 677.

<sup>131</sup> *Skinner v. Beatty*, 16 Cal. 156; *City of San Jose v. Fulton*, 45 id. 316.

<sup>132</sup> *Skinner v. Beatty*, 16 Cal. 156.

<sup>133</sup> *Montgomery v. Middlemiss*, 21 Cal. 103; 81 Am. Dec. 146.

<sup>134</sup> *People v. Grant*, 45 Cal. 97; *City of San Jose v. Fulton*, id. 316.

<sup>135</sup> Id.

<sup>136</sup> *McMann v. Superior Ct.*, 74 Cal. 106; *Buell v. Buell*, 92 id. 303.

<sup>137</sup> *Dorland v. Hanson*, 81 Cal. 202; 15 Am. St. Rep. 44.

<sup>138</sup> *McDonald v. McConkey*, 54 Cal. 143.

gal.<sup>139</sup> Where an execution is issued without authority, a motion to recall it "for the reason that the said execution was wrongfully, unlawfully and improperly issued," sufficiently states the grounds of the motion.<sup>140</sup> An order granting an execution upon a judgment awarded in the Superior Court, as a court of probate, after the lapse of five years from the entry of judgment, is in excess of the jurisdiction of the court, and will be annulled by the Supreme Court upon a writ of review.<sup>141</sup> If an execution is radically defective in failing to follow the judgment, the writ may be quashed by the court in the exercise of a superintending power over its process.<sup>142</sup>

§ 5229b. **Execution — when writ of, is *functus officio*.** When there has been no levy under an execution, and the return day has expired, the writ is *functus officio*, and confers no authority whatever, and a levy and sale by virtue of it is a nullity.<sup>143</sup>

§ 5229c. **Enforcement of decree in equity.** Under California procedure, there is but one form of civil action for the enforcement of a private right, and the rules which under the chancery practice prevents the enforcement of a decree in equity by a proceeding at law have no application.<sup>144</sup> And an action may be maintained by a judgment creditor to enforce a judgment for the foreclosure of the mortgage, declaring the indebtedness therein ascertained to be a lien upon the mortgaged land and directing a sale of the land to satisfy the indebtedness, although he may also have a remedy for the enforcement of the judgment by a sale within five years from its entry.<sup>145</sup>

<sup>139</sup> Buell v. Buell, 92 Cal. 393

<sup>140</sup> Id. Execution erroneously recalled, remedy. See Town of Hayward v. Pimental, 107 Cal. 386.

<sup>141</sup> Cortez v. Superior Ct., 86 Cal. 274; 21 Am. St. Rep. 37.

<sup>142</sup> Flint v. Phipps, 20 Oreg. 340; 23 Am. St. Rep. 124.

<sup>143</sup> Faull v. Cooke, 19 Oreg. 455; 20 Am. St. Rep. 836; Kane v. Preston, 24 Miss. 133; see § 5175, *ante*.

<sup>144</sup> Rowe v. Blake, 99 Cal. 167; 37 Am. St. Rep. 45.

<sup>145</sup> Id. A court of equity will always find the means of enforcing its decree against a delinquent defendant, and its power in this respect is as extensive as the exigencies of the case. Wickersham v. Crittenden, 93 Cal. 17.

## PART FOURTEENTH.

# SPECIAL PROCEEDINGS.

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### CHAPTER I.

#### ACTION AGAINST JOINT DEBTORS.

§ 5280. **In general.** Parties who were not originally served with the summons, and did not appear in the action, may be summoned after judgment, to show cause why they should not be bound in the same manner as though originally served.<sup>1</sup> The summons in such cases must describe the judgment, and require the person summoned to show cause why he should not be bound by it, and must be served in the same manner, and returnable within the same time as the original summons.<sup>2</sup> It is not necessary to file a new complaint.<sup>3</sup> The summons must be accompanied by an affidavit that the judgment or some part thereof remains unsatisfied, specifying the amount due.<sup>4</sup> A part payment of a demand by one of two debtors will not discharge such debtor, making the payment from the payment of the balance; his obligation is to pay the whole.<sup>5</sup> The defendant may answer denying the judgment, or setting up any defense which may have arisen subsequently, or he may deny his liability upon the original obligation, except a discharge by the Statute of Limitations.<sup>6</sup> In Illinois, the remedy is by *scire facias*, under the common law.<sup>7</sup> And a *scire facias* may be issued after it is found

<sup>1</sup> Cal. Code Civ. Pro., § 989; see *Waterman v. Lipman*, 69 Cal. 26; *Davidson v. Knox*, id. 143; *Iron Works v. Davidson*, 73 id. 389; *Stewart v. Spaulding*, 72 id. 264; *Feder v. Epstein*, 69 id. 456; *Alpers v. Schaumel*, 75 id. 590.

<sup>2</sup> Cal. Code Civ. Pro., § 990.

<sup>3</sup> Id.

<sup>4</sup> Id., § 991.

<sup>5</sup> *Griffith v. Grogan*, 12 Cal. 317.

<sup>6</sup> Cal. Code Civ. Pro., § 992.

<sup>7</sup> For proceedings in such cases, consult *Puterbaugh's Common Law Pleading and Practice*, 685; *Marshall v. Maury*, 1 Scam. 231;

that the judgment can not be collected of the one against whom it was rendered.<sup>8</sup> Where in an action against two defendants as joint debtors the summons is served on one only, and no appearance is entered for the other, the judgment should be entered against both defendants, but directing the amount to be made of the joint property of both, and the individual property of the person served.<sup>9</sup> Where the same judgment has passed in one action against two or more parties, they are, in respect to such judgment, joint debtors.<sup>10</sup> This remedy is not cumulative, but is substituted for the former practice allowing a new action.<sup>11</sup> It does not alter any fundamental principle of law as to the joint liability of contractors, but is merely intended to alter the common law in a point of practice.<sup>12</sup> The summons can not be issued on a judgment of the Marine or District Court (in New York), although it has been docketed in the county clerk's office.<sup>13</sup>

**§ 5231. Affidavit against joint debtor not served.**

*Form No. 1171.*

[TITLE OF COURT.]

<p>A. B., Plaintiff,  <i>against</i>          C. D. and E. F., Defendants.</p>
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[VENUE.]

A. B., being duly sworn, says that he is the plaintiff above named; that on the ..... day of ....., 18.., he re-

McFadden v. Fortier, 20 Ill. 509; Berry v. Krone, 46 Ill. App. 82. That a *scire facias* is not an original action, consult *Tiffany v. Breese*, 3 Scam. 499, 547.

<sup>8</sup> As to the mode of proceedings against joint debtors in the state of New York, see N. Y. Code of Civ. Pro., § 1932; *Garrison v. Garrison*, 67 How. Pr. 271; *Produce Bank v. Morton*, 52 id. 157. That a judgment against joint debtors may be enforced by supplementary proceedings, see *Van Clief v. Sickles*, 5 Paige Ch. 505; *Commercial Bank, etc. v. Meach*, 7 id. 448; *Emery v. Emery*, 9 How. Pr. 130; *Jones v. Lawlin*, 1 Sandf. 722.

<sup>9</sup> *Northern Bank of Kentucky v. Wright*, 5 Robt. 604; but *contra*, see *Tay v. Hawley*, 39 Cal. 96.

<sup>10</sup> *Barnes v. Smith*, 16 Abb. Pr. 420.

<sup>11</sup> *Lane v. Salter*, 4 Robt. 239.

<sup>12</sup> *Niles v. Battershall*, 2 Robt. 146.

<sup>13</sup> *Ticknor v. Kennedy*, 4 Abb. Pr. (N. S.) 417.



covered a judgment in the Superior Court of the state of California, in and for the county of . . . . ., against the said defendants, C. D. and E. F., for the sum of . . . . . dollars damages, and . . . . . dollars costs of suit; which judgment was duly given and made by said court, and entered and docketed by the clerk thereof, to be enforced against the joint property of the said C. D. and E. F., and the separate property of the said E. F.; that afterwards, on the . . . . . day of . . . . ., 18.., an execution was issued thereon and delivered to the sheriff of said county of . . . . ., and upon which there was made the sum of . . . . . dollars [or that nothing was made thereon, as the case may be] over and above the costs and fees of the said sheriff upon said execution; that the said judgment remains in full force, and not vacated, annulled, or reversed, and there is now due and unpaid thereon the sum of . . . . . dollars, and interest on said sum from the . . . . . day of . . . . ., 18.., at the rate of . . . . . per cent. per annum; that in said action, in which said judgment was obtained as aforesaid, service of the summons was made upon the said E. F., but not upon the said C. D., and he makes this affidavit in a proceeding against said C. D. under the statute in such case made and provided, to require him to show cause why he should not be bound by the said judgment.

[JURAT.]

[SIGNATURE.]

**§ 5232. Summons against joint debtor to show cause, etc.***Form No. 1172.*

[TITLE.]

The people of the state of California send greeting: To C. D., defendant.

You are hereby summoned and required to show cause within ten days (exclusive of the day of service), after the service of this summons upon you, [if served within this county, or if served out of this county but in this district within twenty days, otherwise within forty days], why you should not be bound by a certain judgment duly given and made by the said Superior Court of the state of California, in and for the said county of . . . . ., on the . . . . . day of . . . . ., 18.., in favor of A. B., and against you and one E. F., for the sum of . . . . . dollars damages, and . . . . . dollars costs of suit, in the same manner as if you had been originally sum-

moned therein, and upon which said judgment it is alleged there remains due and unpaid the sum of ..... dollars, and interest on said sum from the ..... day of ....., 18.., at the rate of ..... per centum per annum, as more fully appears by the affidavit of the said plaintiff, A. B., hereto attached, and to which reference is here made.

And you are hereby notified that if you fail to appear and show cause as above required within the time above stated, the said plaintiff will apply to the said court for an order and judgment that you be bound thereby in all respects as though you had been originally summoned in said action, to the extent of the said sum of ..... dollars, and interest as aforesaid, and the cost of this proceeding, and that execution issue against you accordingly.

[ATTESTATION, DATE, AND SIGNATURE.]

§ 5233. **Answer.** The party summoned may answer the complaint as he might have done had he been originally served, or he may deny the judgment, or may set up any defense that may have arisen subsequently to the judgment. The action is really an action on the original joint contract, and matters of defense with respect to the judgment are merely incidental to the action.<sup>14</sup> The party summoned may deny the judgment, or set up any defense which may have arisen subsequently; or he may deny his liability on the obligation upon which the judgment was recovered, except a discharge from such liability by the Statute of Limitations.<sup>15</sup>

§ 5234. **Issues and verdict.** The issues formed may be tried as in other cases; but when the defendant denies, in his answer, any liability upon the obligation upon which the judgment was rendered, if a verdict be found against him, it shall be for the amount remaining unsatisfied on such original judgment, with interest thereon.<sup>16</sup>

§ 5235. **Pleadings.** If the defendant in his answer deny the judgment, or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer shall constitute the written obligations in the case; if he deny his liability on the obligation upon which the judgment was

<sup>14</sup> *Tay v. Hawley*, 39 Cal. 98; 2 Am. Rep. 427.

<sup>15</sup> Cal. Code Civ. Pro., § 992; *Berlin v. Hall*, 48 Barb. 442.

<sup>16</sup> *Id.*, § 994.

recovered, a copy of the original complaint and judgment, the summons, with the affidavit annexed, and the answer, shall constitute such written allegations.<sup>17</sup>

**§ 5236. Release.** Prior to the Code, the release of one joint debtor was a release as to all, but it was required to be a technical release under seal.<sup>18</sup> It is now provided, however, that "a release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him."<sup>19</sup> One of two joint debtors, who has been released under the insolvent act, is liable to contribution to his codebtor for money paid to satisfy the joint obligation after the discharge.<sup>20</sup>

<sup>17</sup> Cal. Code Civ. Pro., § 903.

<sup>18</sup> See *Armstrong v. Hayward*, 6 Cal. 185; *Rowley v. Stoddard*, 7 Johns. 210; *Cheatham v. Ward*, 1 Bos. & Pul. 633; *Nicholson v. Revill*, 1 Ad. & El. 683; *American Bank v. Doolittle*, 14 Pick. 126; *Tuckerman v. Newhall*, 17 Mass. 583; *Goodman v. Smith*, 18 Pick. 415; cited in *Prince v. Lynch*, 38 Cal. 528; 99 Am. Dec. 427; § 5230, *ante*.

<sup>19</sup> Cal. Code Civ. Pro., § 1543; see *Tompkins v. Clay St. R. R. Co.*, 66 Cal. 163.

<sup>20</sup> *Ford v. Andrews*, 9 Wend. 312; *Frost v. Carter*, 1 Johns. Cas. 74; *Elsworth v. Caldwell*, 18 Abb. Pr. 20.

## CHAPTER II.

### PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

§ 5237. **In general.** There are three classes of cases provided for in which proceedings supplementary to the execution may be had: 1. Where an execution against property of a judgment debtor is returned unsatisfied in whole or in part, the judgment creditor at any time after the return is entitled to an order requiring the judgment debtor to appear before such judge or a referee to answer concerning his property, but can not be required to attend out of the county where he resides.<sup>1</sup> This proceeding is based on the return of the execution, and no proof of property seems necessary. After the issuing of an execution against property, and upon proof by affidavit of the party or otherwise, to the satisfaction of the court or judge, or county judge, that any judgment debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment, the judgment debtor may in like manner be required to appear and answer.<sup>2</sup> This proceeding is based on the proof of the existence of property, and no return of execution is necessary, but only that one shall have been issued against property; and it would seem that this proceeding was intended to be in aid of an existing execution. After the issuing or return of an execution against property, upon proof by affidavit or otherwise to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order, require such person or corporation, or any officer or member thereof, to appear before him or a referee appointed by him and answer concerning the same.<sup>3</sup> After the issuing and before the return of an execution against property, any person indebted to the judgment debtor may pay the sheriff the amount of his debt or enough to satisfy the execution.<sup>4</sup>

<sup>1</sup> Cal. Code Civ. Pro., § 714.

<sup>2</sup> Id., § 715.

<sup>3</sup> Id., § 717; see N. Y. Code Civ. Pro., §§ 2432-2471.

<sup>4</sup> Id., § 716; and see N. Y. Code Civ. Pro., § 2446.

Proceedings supplementary to execution, as provided in the California Practice Act, are proceedings which are a substitute for a creditor's action in the old practice;<sup>5</sup> and are regulated by statute, and are equally applicable to Justices' Courts.<sup>6</sup> It is not necessary to join in the proceedings the defendant not served in the action.<sup>7</sup> They can not, however, be had against corporations as judgment debtors in the action;<sup>8</sup> at least they are not applicable to insolvent corporations.<sup>9</sup> But where the proceedings are against third parties who are indebted to the judgment debtor, a corporation, or any officer or member thereof, may be required to appear and answer concerning such indebtedness.<sup>10</sup> A foreign consul can not be required to submit to an examination.<sup>11</sup> Before supplementary proceedings can be instituted on the return of an execution, the creditor's remedy by execution must be really exhausted.<sup>12</sup> A levy of a second execution, if not sure to satisfy the debt, is no objection to supplementary proceedings under the first execution.<sup>13</sup>

<sup>5</sup> *Adams v. Hackett*, 7 Cal. 187; *McCullough v. Clark*, 41 id. 298; *Pacific Bank v. Robinson*, 57 id. 520; and see *Sperling v. Calfee*, 7 Mont. 514; *Ryan v. Maxey*, 14 id. 83. Such proceedings, whether had before or after the return of the execution unsatisfied, are not in the nature of a new action. *Collins v. Angell*, 72 Cal. 513. As to their true nature, see, also, *Timm v. Stegman*, 6 Wash. St. 13; *Williams v. Gallick*, 11 Oreg. 337; *Knowles v. Herbert*, id. 240; *Carriage Co. v. Richardson*, 59 N. Y. St. Rep. 654; *Joyce v. Spafard*, 9 Civ. Pro. Rep. 342; *Smith v. Tozer*, 42 Hun, 22.

<sup>6</sup> Cal. Code Civ. Pro., § 905. As to how far these proceedings are deemed a new action, compare *Davis v. Turner*, 4 How. Pr. 190; *Orr's Case*, 2 Abb. Pr. 457; *Dresser v. Van Pelt*, 15 How. Pr. 19.

<sup>7</sup> *Emery v. Emery*, 9 How. Pr. 130.

<sup>8</sup> *Hinds v. Canandaigua & Niagara Falls R. R. Co.*, 10 How. Pr. 487; *Sherwood v. Buffalo & New York City R. R. Co.*, 12 id. 136. Proceedings may be instituted against a foreign corporation having no agent and doing no business in the state, and a receiver of its property may be appointed. *Logan v. Publishing Co.*, 140 N. Y. 447.

<sup>9</sup> *Hammond v. Hudson River Iron & Machine Co.*, 11 How. Pr. 29.

<sup>10</sup> Cal. Code Civ. Pro., § 717; N. Y. Code Civ. Pro., § 2441; and see *Pendergast v. Dempsey*, 18 Civ. Pro. Rep. 198.

<sup>11</sup> *Griffin v. Dominguez*, 2 Duer, 656.

<sup>12</sup> *Rodney v. Griffiths*, 6 Abb. Pr. 211; *Spencer v. Cuyler*, 17 How. Pr. 157; *Nagle v. James*, 7 Abb. Pr. 234.

<sup>13</sup> *Sale v. Lawson*, 4 Sandf. 718; *Fellerman's Case*, 2 Abb. Pr. 155; *Lillendal v. Fellerman*, 11 How. Pr. 528.

**§ 5238. Affidavit and order for examination of judgment debtor, or of bailee or debtor of judgment debtor.**

*Form No. 1173.*

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says as follows:

I. I am the plaintiff in the above-entitled action.

II. On or about the ..... day of ..... 18.., I recovered a judgment in said action in the Superior Court of the state of ....., in and for the county of ....., against C. D., the defendant in said action, for ..... dollars, or thereabouts, for damages and costs, which judgment was duly entered and docketed in the office of the clerk of said court, in the said ..... county of .....; that an execution against the property of the said defendant was duly issued thereon, and delivered to the sheriff of said ..... county of .....

III. That, as I am informed and verily believe, the said C. D. has property which he unjustly refuses to apply towards the satisfaction of said judgment, to-wit [designate property.]

IV. That, as I am informed and verily believe, E. F. has property belonging to said judgment debtor [or is indebted to the said judgment debtor], in an amount exceeding fifty dollars to-wit: in the sum of ..... dollars.

[JURAT.]

[SIGNATURE.]

**§ 5239. Affidavit.** The affidavit must show as a jurisdictional fact, that the execution was against the property.<sup>14</sup> It need not state that the defendant has property. If the affidavit shows that the creditor is assignee of the judgment, it sufficiently shows his right to proceed;<sup>15</sup> or it may be in the name of the nominal plaintiff, for it is not a new suit.<sup>16</sup> On application for an order to examine a third party, and affidavit, following the alternative words of the statute, "has property, etc., or is indebted," is not sufficient.<sup>17</sup>

<sup>14</sup> *People v. Hurlburt*, 5 How. Pr. 446.

<sup>15</sup> *Hough v. Kohlin*, 1 Code Rep. (N. S.) 232; *Orr's Case*, 2 Abb. Pr. 457; *Ross v. Clusman*, 3 Sandf. 676.

<sup>16</sup> *Id.*

<sup>17</sup> *Lee v. Heirberger*, 1 Code Rep. 38. Sufficiency of affidavit. See, also, *Tefft v. Epstein*, 17 Civ. Pro. Rep. 168; *Miller v. Adams*, 52 N. Y. 409; *Schenck v. Irwin*, 60 Hun, 361; *Batchelder v. Nugent*, 23 Civ. Pro. Rep. 178; *Collins v. Beebe*, 27 N. Y. St. Rep. 4. The

**§ 5240. Order for appearance of debtor.***Form No. 1174.***[TITLE.]**

On reading the foregoing affidavit, and it satisfactorily appearing to me therefrom that an execution was duly issued against the property of C. D., the defendant in the above-entitled action, upon the judgment recovered therein, and that said C. D. has property which he unjustly refuses to apply towards the satisfaction of the judgment in said action, and that it is a proper case for this order, and on application of the plaintiff's attorney, I, the undersigned, judge of the said Superior Court of the county of . . . . ., state of . . . . ., do hereby order and require the said defendant, C. D., personally to be and appear before G. H., the referee by me hereby appointed for that purpose, at his office in . . . . ., in the county of . . . . ., on the . . . . . day of . . . . ., 18.., at . . . . . o'clock in the . . . . . noon of that day, to answer concerning his property; and that a copy of said affidavit and of this order be previously served upon said defendant, C. D.

**[DATE.]****[SIGNATURE.]**

**§ 5241. Order.** It is sufficient to confer jurisdiction on a return of execution unsatisfied, if it appear in respect to defendant's residence that the execution was issued to the sheriff of the county where he then resided and had a place of business, and the order must be made returnable "within the county to which the execution was issued."<sup>18</sup> The issuing and service of an order creates no lien as against other creditors who in the meantime discover other property subject to execution and levy

affidavit may, with permission, be amended to conform to the original proceeding. *Murne v. Schwabacher*, 2 Wash. Ter. 130.

<sup>18</sup> *Bingham v. Disbrow*, 14 Abb. Pr. 251; *Jesup v. Jones*, 32 How. Pr. 191; but see Cal. Code Civ. Pro., § 714. Under this section after an execution has been returned unsatisfied, the judgment creditor is entitled to an order directing the judgment debtor to appear and answer concerning his property, without making any affidavit therefor. *Collins v. Angell*, 72 Cal. 513. As to the practice in New York, in procuring an order for the examination of third persons, see *Ward v. Beede*, 17 Abb. Pr. 1; S. C., 15 id. 373; *Gibson v. Haggerty*, 37 N. Y. 555; *Lynch v. Johnson*, 46 Barb. 56. Form of affidavit and order. See *Seeley v. Garrison*, 10 Abb. Pr. 460. See, also, as to contents of order, *Day v. Brosnan*, 6 Abb. N. O. 312; *Milliken v. Thomson*, 8 N. Y. St. Rep. 106; *Shults v. Andrews*, 54 How. Pr. 376.

upon the same.<sup>19</sup> Where a judgment debtor is examined on supplementary proceedings, the order made is binding and estops the parties from again litigating the same matter in another action. If property be ordered to be delivered to the sheriff for sale under the execution, no action can be maintained against the sheriff for so selling it.<sup>20</sup>

§ 5242. **Order forbidding debtor to transfer.** The judge who makes an appointment of a receiver may make an order forbidding the debtor to transfer any debts or make other disposition of them until an opportunity be given the receiver to sue;<sup>21</sup> and on violation of the order he is liable to punishment, as for a contempt.<sup>22</sup>

§ 5243. **Order for payment.** An order requiring the application of property to the payment of a judgment may be in the alternative that the defendant pay over, or that an attachment issue.<sup>23</sup> Under the California practice, an appeal may be taken from an order made by a court or referee on proceedings supplementary to execution;<sup>24</sup> so also in Nevada;<sup>25</sup> but it seems that in New York such orders are discretionary, and an order denying an application for them is not appealable.<sup>26</sup>

§ 5244. **Order for appearance of bailee or debtor of judgment debtor.**

*Form No. 1175.*

[TITLE.]

On reading the foregoing affidavit, and it satisfactorily appearing to me therefrom that A. B. has property of the judg-

<sup>19</sup> *Becker v. Torrance*, 31 N. Y. 631; consult *Voorhees v. Seymour*, 26 Barb. 569; *Duffy v. Dawson*, 46 N. Y. St. Rep. 268; 50 id. 584.

<sup>20</sup> *McCullough v. Clark*, 41 Cal. 298.

<sup>21</sup> *Ball v. Goodenough*, 37 How. Pr. 479. The only power of the court in proceedings supplementary to execution, in respect to an action by the judgment creditor, is to make an order authorizing such creditor to sue in the proper court to recover indebtedness due to the judgment debtor, and to forbid a transfer pending the action, and such an order is not an adjudication of the rights of the parties. *McDowell v. Bell*, 86 Cal. 616; *High v. Bank of Commerce*, 103 id. 525.

<sup>22</sup> *People ex rel. Noel v. Kingsland*, 3 Keyes, 325; S. C., 5 Abb. Pr. (N. S.) 90.

<sup>23</sup> *Crouse v. Wheeler*, 33 How. Pr. 337.

<sup>24</sup> *McCullough v. Clark*, 41 Cal. 298.

<sup>25</sup> *Hagerman v. Tong Lee*, 12 Nev. 331.

<sup>26</sup> *Joyse v. Holbrook*, 7 Abb. Pr. 338.



ment debtor therein mentioned, and is indebted to him in an amount exceeding fifty dollars, to-wit, in the sum of ..... dollars, and that it is a proper case for this order, and on application of the plaintiff's attorney, I, the undersigned, judge of the said Superior Court of the county of ....., state of ....., do hereby order and require the said A. B. personally to be and appear before E. F., the referee by me hereby appointed for that purpose, at his office in ....., in the county of ....., on the ..... day of ....., 18.., at ..... o'clock in the ..... noon of that day, to answer concerning any property of the said judgment debtor in his possession, and concerning any debts due by him to the said judgment debtor; and that a copy of said affidavit and of this order be previously served upon said defendant, and upon said A. B.

[DATE.]

[SIGNATURE.]

§ 5245. **Contempt.** If any person, party, or witness disobey an order of the referee, properly made, in proceedings before him under this chapter, he may be punished by the court or judge for a contempt;<sup>27</sup> and it is contempt to refuse on the ground that he is a witness attending on another court.<sup>28</sup> The court will not punish a debtor for contempt in disregarding the order requiring an examination before a referee in supplementary proceedings, where the same plaintiff had obtained a previous order against him on the same judgment, which was outstanding and not disposed of.<sup>29</sup> If the judge finds the defendant able to pay the judgment, and orders him to do so within a time specified, and also to pay the costs stated, the defendant, if he fails to comply, may be proceeded against as for a contempt.<sup>30</sup> For any disobedience to the order of the judge out of court, the court may punish by order to show cause or attachment.<sup>31</sup>

<sup>27</sup> Cal. Code Civ. Pro., § 721; and see *Perkins v. Kendall*, 3 Civ. Pro. Rep. 240; *Fleming v. Tourgee*, 21 id. 297; 16 N. Y. Supp. 2; *Shults v. Andrews*, 54 How. Pr. 378; N. Y. Code Civ. Pro., § 2457.

<sup>28</sup> *Page v. Randall*, 6 Cal. 32.

<sup>29</sup> *Brockway v. Brien*, 37 How. Pr. 270. As to the proper method of obtaining the attendance of a witness upon a hearing in supplementary proceedings, consult *People, etc. v. Dutcher*, 3 Abb. Pr. (N. S.) 152.

<sup>30</sup> *Brush v. Lee*, 6 Abb. Pr. (N. S.) 50.

<sup>31</sup> *Wickes v. Dresser*, 4 Abb. Pr. 93; compare *Wicker v. Dresser*, 14 How. Pr. 465; see "Contempts," *post*, chap. 5.

§ 5246. **Examination of third persons.** Sections 241, 242, and 243 of the California Practice Act,<sup>32</sup> relating to proceedings supplementary to execution, do not authorize the court to make an order for the application of property of the judgment debtor in the hands of a third party to the satisfaction of a judgment, upon the mere affidavit of the plaintiff, without first examining the party alleged to have the property in his possession, as to the truth of the allegation. The order to apply the property to the satisfaction of the judgment must be based upon the answer of the person alleged to have it in his possession, and such other testimony as may be adduced at the hearing, in connection with his answer. The affidavit of the plaintiff merely serves as the basis of a proceeding to acquire jurisdiction of a party who was before a stranger to the action.<sup>33</sup> Where it is evident that a garnishee, on examination under an order supplementary to execution, acts in bad faith in denying his indebtedness or asserting his claim, the referee may treat it as fraudulent and disregard it.<sup>34</sup>

§ 5247. **Liability of third parties.** Where the defendant in an action, whose property has been attached by the sheriff, deposited with the sheriff a sum of money in gold coin in lieu of an undertaking to procure a release of the property, and the property was thereupon released, and afterwards, by agreement between the parties to the action, the money was taken from the sheriff and loaned out pending the litigation, and a note drawing interest taken therefor, payable to plaintiff's attorney, it was held that after plaintiff recovered judgment, the persons who borrowed the money did not hold in the character of bailees of the sheriff, but that they were mere debtors, and the money in their hands a mere debt, to be treated as such on proceedings supplementary to execution.<sup>35</sup> In order to bring a party within the terms of the two hundred and fortieth section of the Practice Act,<sup>36</sup> there must be a judgment and an execution thereon against property, and the person making the payment must be indebted at the instant to him against whom the execution runs.<sup>37</sup> If

<sup>32</sup> Cal. Code Civ. Pro., §§ 717-719.

<sup>33</sup> Hathaway v. Brady, 26 Cal. 586.

<sup>34</sup> Parker v. Page, 38 Cal. 522; but see Hagerman v. Tong Lee, 12 Nev. 331.

<sup>35</sup> Hathaway v. Brady, 26 Cal. 586.

<sup>36</sup> Cal. Code Civ. Pro., § 716.

<sup>37</sup> Brown v. Ayres, 33 Cal. 525; 91 Am. Dec. 655.

there is any dispute as to the ownership of the property, or if the third person proceeded against in good faith denies the debt, neither the judge nor referee has power or authority to decide the disputed question and order the property delivered, or money paid in satisfaction of the judgment; the only course to pursue is to apply for an order forbidding any transfer or other disposition, and authorizing a suit.<sup>38</sup>

§ 5248. **Satisfaction of demand.** The plaintiff, in an action for a personal tort, after a verdict in his favor, and before judgment, assigned the cause of action and verdict. Judgment having been subsequently entered, defendant was garnished under the execution issued on other judgments against the plaintiff, and paid to the sheriff the amount of the judgment in favor of the plaintiff against him, who applied the same upon the executions; it was held that the assignment was void, and that the payment by defendant to the sheriff was a satisfaction of the judgment.<sup>39</sup>

§ 5249. **Receiver may be appointed.** In proceedings supplementary to execution the court has power, when it has all parties before it, to appoint a receiver, and order a note in the hands of a third person, a party to the proceeding, and payable to the judgment debtor, or to such third person, as trustee of the judgment debtor, to be delivered up to the receiver, to be collected by suit or otherwise under its direction, and the proceeds applied to the payment of the debt.<sup>40</sup>

<sup>38</sup> Under § 246, Nev. Stat. (Cal. Code Civ. Pro., § 720); *Hagerman v. Tong Lee*, 12 Nev. 331.

<sup>39</sup> *Lawrence v. Martin*, 22 Cal. 173.

<sup>40</sup> *Hathaway v. Brady*, 26 Cal. 586; 68 Am. Dec. 410. As to proceedings therein, consult *Bloodgood v. Clark*, 4 Paige Ch. 574; *Fitzburgh v. Haveringham*, 6 id. 29; *Browning v. Bettis*, 8 id. 568; *Kemp v. Harding*, 4 How. Pr. 178; *Dorr v. Noxon*, 5 id. 29; *Myres' Case*, 2 Abb. Pr. 476; *Todd v. Crooke*, 4 Sandf. 694; *People v. Hurlburt*, 5 How. Pr. 446; *Ball v. Goodenough*, 37 id. 479; *Kennedy v. Thorp*, 3 Abb. Pr. (N. S.) 131; *Strohn v. Epstein*, 14 Abb. N. C. 322; *Morgan v. Von Kohnstamm*, 60 How. Pr. 161; *Sayles v. Best*, 20 N. Y. Supp. 951; *Grace v. Curtiss*, 23 id. 321; *Terry v. Bange*, 24 N. Y. St. Rep. 599. The history of a receiver's powers under several statutes considered. *Hayner v. Fowler*, 16 Barb. 300; see *Porter v. Williams*, 9 N. Y. 142; *Edmonston v. McLoud*, 16 id. 543.

§ 5250. **Witnesses.** Witnesses may be required to appear and testify before the judge or referee upon any proceeding under this chapter in the same manner as upon the trial of an issue.<sup>41</sup>

§ 5251. **What property may be reached.** Supplementary proceedings are limited to reaching the property of the judgment debtor in his possession or in the possession of another party which is conceded to belong to the defendant. The judge has no power to try the question of title, where the property is in the hands of others who make claim to it.<sup>42</sup> Property held in trust for the support of the judgment debtor can not be reached;<sup>43</sup> but property previously deposited in bank, under an account opened in his name "in trust," can be so reached.<sup>44</sup> The creditor can only reach moneys actually due, and not moneys to become due on a contingency or on an executory contract;<sup>45</sup> nor property acquired after commencement of the proceedings and which had already been paid out to another creditor;<sup>46</sup> nor the earnings accruing after the date of the order;<sup>47</sup> nor movables which the debtor assigned for the benefit of his creditors while the execution was in life in the sheriff's hands;<sup>48</sup> nor a right of action for a mere tort;<sup>49</sup> nor the interest of the debtor as a *cestui que trust*.<sup>50</sup> Where the wife declares a homestead, and the hus-

<sup>41</sup> Cal. Code Civ. Pro., § 718; McCullough v. Clark, 41 Cal. 298; and see Knowles v. De Lazare, 3 How. Pr. (N. S.) 35; Benjamin v. Myers, 3 N. Y. St. Rep. 284; Schwab v. Cohen, 13 id. 709; N. Y. Code Civ. Pro., § 2460.

<sup>42</sup> Hagerman v. Tong Lee, 12 Nev. 331; Stewart v. Foster, 1 Hilt. 505; Hall v. McMahon, 10 Abb. Pr. 103; Teller v. Randall, 40 Barb. 242; Crounse v. Whipple, 34 How. Pr. 333. See McDowell v. Bell, 86 Cal. 615.

<sup>43</sup> Locke v. Mabbett, 2 Keyes, 457; Campbell v. Foster, 35 N. Y. 361; Manning v. Evans, 19 Hun, 500.

<sup>44</sup> People v. Kingsland, 3 Keyes, 325; S. C., 5 Abb. Pr. (N. S.) 90.

<sup>45</sup> McCormick v. Kehoe, 7 N. Y. Leg. Obs. 184.

<sup>46</sup> Caton v. Southwell, 13 Barb. 335.

<sup>47</sup> Campbell v. Foster, 16 How. Pr. 275.

<sup>48</sup> Weed v. Pierce, 9 Cow. 728; Watrous v. Lathrop, 4 Sandf. 700.

<sup>49</sup> Ten Broeck v. Sloo, 2 Abb. Pr. 234.

<sup>50</sup> Scott v. Nevius, 6 Duer, 672; Stewart v. Foster, 1 Hilt. 505. As to what property may be reached, see Pacific Bank v. Robinson, 57 Cal. 520; Collins v. Angell, 72 id. 513; Winters v. McCarthy, 2 Abb. N. C. 357; Rainsford v. Temple, 22 N. Y. Supp. 937; Serven v. Lowerre, 23 id. 1052. Proceedings supplemental to execution can reach choses in action arising from torts committed on the property of the judgment debtor which might be reached by a

band effects an insurance on the dwelling, taking the policy in his name, and the dwelling is destroyed by fire, the sum due from the insurance company can not be garnished by a creditor of the husband.<sup>51</sup>

§ 5252. **Arrest of judgment debtor.** Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor, his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge he may be ordered to enter into an undertaking, with sufficient surety, that he will attend, from time to time, before the judge or referee, as may be directed, during the pendency of the proceedings, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking he may be committed to prison.<sup>52</sup> This is a portion of the section which seems to be in aid of an existing execution, and must be accompanied by proof of property. Nothing is here said of the necessity of showing fraud; but it would seem to be necessary under the California Constitution.

§ 5253. **Affidavit for order of arrest.**<sup>53</sup>

*Form No. 1176.*

[TITLE.]

[Same in Form No. 1173, down to and including III.]

IV. And I further state that I have reason to believe, and do believe, that there is danger of the said C. D.'s absconding, and going beyond the reach of the process of this court, or without the limits of the state, with intent to defraud his creditors, and myself particularly; that my reasons for such belief are as follows [state facts].

[JURAT.]

[SIGNATURE.]

creditor's bill, and the court in such proceedings may authorize a suit by the judgment creditor to recover such choses in action. *Staples v. May*, 87 Cal. 178. Order authorizing judgment creditor to sue. See *High v. Bank of Commerce*, 95 Cal. 386; 103 id. 525. *Deering v. Richardson-Kimball Co.*, 109 id. 73.

<sup>51</sup> *Houghton v. Lee*, 50 Cal. 101.

<sup>52</sup> Cal. Code Civ. Pro., § 715; N. Y. Code Civ. Pro., §§ 2437, 2440; and see *Netzel v. Mulford*, 59 How. Pr. 452; *Robshand v. Waring*, 1 Abb. N. C. 311.

<sup>53</sup> As to forms of order and undertaking, the forms under "Arrest and Bail" as a provisional remedy, *ante*, may be made to apply, with certain changes which will readily suggest themselves to the practitioner.

## CHAPTER III.

### · ARBITRATIONS AND AWARDS.

**§ 5254. Agreement of general submission to arbitration — short form.**

*Form No. 1177.*

[TITLE.]

We, the undersigned, mutually agree to submit, and do hereby submit, all our matters in difference, of every name or nature, to the award and decision of P. Q., R. S., and T. U., for them to hear and determine the same, and make their award in writing, on or before the ..... day of ..... next.

Witness our hands, this ..... day of ....., 18..

[SIGNATURES AND SEALS.]

**§ 5255. Agreement of special submission to arbitration.**

*Form No. 1178.*

[TITLE.]

Whereas a controversy is now existing and pending between A. B., of, etc., and C. D., of, etc., in relation to certain mining claims and quartz-mills, under a contract made by and between the said parties, at the town of ..... aforesaid, on the ..... day of ..... last past:

Now, therefore, we, the undersigned, A. B. and C. D., aforesaid, do hereby submit the said controversy to the arbitrament of P. Q., R. S., and T. U., of, etc., or any two of them; and we do mutually covenant and agree, to and with each other, that the award to be made by the said arbitrators, or any two of them, shall in all things, by us and each of us, be well and faithfully kept and observed; provided, however, that the said award be made in writing, under the hands of the said P. Q., R. S., and T. U., or any two of them, and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on the ..... day of ..... next.

And it is hereby further stipulated and agreed by and between the said A. B. and C. D., the parties to said controversy, that this submission to arbitration of the controversy herein named

shall be entered as an order of the Superior Court of the State of California, in and for the county of .....

Witness our hands, etc.

[SIGNATURES AND SEALS.]<sup>1</sup>

**§ 5256. Agreement to determine partnership disputes by arbitration.**

*Form No. 1179.*

This agreement, made and entered into this ..... day of ....., 18.., between A. L. of the first part, F. H. of the second part, and G. F. of the third part, all of the city of ....., county of .....

Whereas the said parties of the first and second parts were, for a long time prior to the ..... day of ....., 18.., engaged and concerned together as copartners, which partnership was dissolved.

And whereas, for the purpose of compromising, finally ending, and absolutely determining all differences, controversies, actions, suits, debts, accounts, and demands whatsoever, had, made, moved, depending, arising, or accruing, or which at any time or times may be had by or between said parties of the first and second parts, for or by reason or means of the accounts of said copartnership, or of any matter or thing relating thereto, resulting therefrom, or otherwise howsoever, it has been covenanted by said parties to refer all such differences of accounts to the said party of the third part for arbitration and adjustment, and the said party of the third part has consented to become such arbitrator.

Now, this agreement witnesseth, that the said parties of the first and second parts do hereby mutually covenant and agree, to and with each other, that the said party of the third part shall arbitrate, award, order, judge, and determine of and concerning all and all manner of actions, cause and causes of actions, suits, controversies, claims, and demands whatsoever relating to or growing out of their copartnership account, prior to the ..... day of ....., 18.., and shall conclude such arbitration, and make award, and deliver the same to either of said parties of the first or second part in three months from this day; and said parties of the first and second parts mutually agree to abide by the said award in all things.

<sup>1</sup> As to making submission an order of court, see Cal. Code Civ. Pro., § 1283; Cal. Academy Sciences v. Fletcher, 99 Cal. 207.

**§ 5257. Release to be executed by party to an arbitration, when required in the award.**

*Form No. 1180.*

Know all men by these presents, that I, A. B., of the ..... county of ....., for and in consideration of the sum of one dollar, to me in hand paid by C. D., of ....., and in pursuance of an award made by P. Q., R. S., and T. U., arbitrators between us, the said A. B. and C. D., and bearing date the ..... day of ....., 18.., do hereby release and forever discharge the said C. D., his heirs, executors, and administrators, of and from all actions, cause and causes of action, suits, controversies, claims, and demands whatsoever, for or by reason of any matter, cause, or thing, from the beginning of the world down to the ..... day of ....., 18.. [Insert the date of submission].

In witness whereof, etc.

[SIGNATURES AND SEALS.]

**§ 5258. Report of arbitrators.**

*Form No. 1181.*

[TITLE.]

We, the undersigned arbitrators appointed by the agreement of arbitration hereto annexed, respectfully report that the matters in said agreement of arbitration mentioned were duly brought to a hearing before us, on the ..... day of ....., 18.., at the office of ....., in the ..... county of ....., the said A. B. attending with his counsel, C. D., Esq., and E. F. attending with his counsel, G. H., Esq.; and evidence by and on behalf of each of the respective parties having been submitted and received, we find therefrom and make the following award [set forth award].

P. Q.,  
R. S.,  
X. Y.,  
Arbitrators.

[DATE.]

**§ 5259. Report of arbitrators or referee on a part of issues, or on an account.**

*Form No. 1182.*

[TITLE.]

To the ..... court of .....

A reference having been made to me, by order dated the



..... day of ....., 18.., to ..... in this action, I respectfully report:

That I have heard both parties, and find the annexed account to be correct.

[ACCOUNT.]

[Or find the following facts: state them.]

C. D., Referee.

§ 5260. **Award conclusive.** An award rendered upon a fair arbitration of a matter in dispute between two parties, and for a long time after concurred in, must be held to be conclusive.<sup>2</sup> The award of money is absolute and unconditional, but the award of releases is different, for they are concurrent acts, and neither party can compel the other to execute a release, without the tender of a release by himself.<sup>3</sup> Where parties submit to an arbitrator, they are presumed to know that his award will be final, and they must be required to exercise due diligence in procuring the evidence upon which to base a proper award.<sup>4</sup> An award is void which is not final and conclusive, and does not embrace all the matter submitted.<sup>5</sup>

§ 5261. **Duty of arbitrators.** It is the duty of arbitrators to pass upon the whole subject in controversy, and if it appears on the face of the award that they have not disposed of the whole matter, or if the terms of the award render a further inquiry necessary to ascertain a sum to be paid or an act to be done, it is void.<sup>6</sup>

§ 5262. **Hearing.** Each party to an arbitration is entitled to an opportunity to be heard in the presence of the other, and to have reasonable time to produce witnesses and examine them.<sup>7</sup>

<sup>2</sup> *Jarvis v. Fountain Water Co.*, 5 Cal. 179. See, also, as to conclusiveness of award, *Fulmore v. McGeorge*, 91 Cal. 611; *Robinson v. Lodge*, 97 id. 62; *Garrow v. Nicolai*, 24 Oreg. 76; *Bachelder v. Wallace*, 1 Wash. Ter. 107; *Thornton v. McCormick*, 75 Iowa, 285; *Sweet v. Morrison*, 116 N. Y. 19; 15 Am. St. Rep. 376.

<sup>3</sup> *Dudley v. Thomas*, 23 Cal. 365.

<sup>4</sup> *Montifiori v. Engels*, 3 Cal. 431.

<sup>5</sup> *Talbott v. Hartley*, 1 Cranch C. C. 31; *Colcord v. Fletcher*, 50 Me. 398; *McCrary v. Harrison*, 36 Ala. 577.

<sup>6</sup> *Porter v. Scott*, 7 Cal. 312; see § 5270, *ante*.

<sup>7</sup> *Morewood v. Jewett*, 2 Robt. 496. An award is invalid and void unless both of the parties have notice of the time and place of the meeting of the arbitrators, and an opportunity to be heard. *Curtis v. Sacramento*, 64 Cal. 102; see Cal., etc., *M. E. Church v. Seitz*, 74 id. 287.

§ 5263. **Invalid awards.** An award, to be valid, must be certain and decisive as to the matters submitted, and thus avoid all further litigation.<sup>8</sup> A useless and invalid determination upon one item properly presented within the general terms of the submission must, on principle, be as fatal to the entire action of the arbitrators as an omission, intentional or unintentional, to notice the item at all.<sup>9</sup> But the making of a new and supplementary paper, and attaching the same to the award after it has been delivered, does not vitiate the original award, and may be treated as surplusage.<sup>10</sup> An award is avoided by a mistake in law by an arbitrator as to what is submitted to his decision.<sup>11</sup> An award bad in part may be enforced for the part that is good, if not attacked for fraud, and the matter is divisible.<sup>12</sup>

§ 5264. **Jurisdiction.** Where it is stipulated that the submission be made an order of court, it must be of some court having jurisdiction of the subject-matter of the controversy, otherwise it is void *in toto*, and the arbitrators have no power under it.<sup>13</sup> If it appear that the intention was to make the award only a rule of court, the court has no jurisdiction.<sup>14</sup> It does not follow that because a matter in difference between parties may be submitted by them to arbitration, that a court of record, or any other court, will thereby acquire jurisdiction of the subject-matter in controversy or of the parties litigant, unless the agreement further stipulate that the submission and stipulation are filed with the clerk, and the clerk enter in his register of actions a note of the submission, with the names of the parties, the name of the arbitrator, etc., as required by the Practice Act.<sup>15</sup> In order to give the court jurisdiction, there must be a stipulation that the submission be entered as an

<sup>8</sup> Jacob v. Ketcham, 37 Cal. 197; and see Fulmore v. McGeorge, 91 id. 611.

<sup>9</sup> Muldrow v. Norris, 12 Cal. 331.

<sup>10</sup> Dudley v. Thomas, 23 Cal. 365.

<sup>11</sup> Walker v. Walker, 1 Wins. (N. C.) 259.

<sup>12</sup> Muldrow v. Norris, 2 Cal. 74; 56 Am. Dec. 313; Parmelee v. Allen, 32 Conn. 115; White v. Arthur, 59 Cal. 33. Instance of an award not void for uncertainty. Carsley v. Lindsay, 14 Cal. 390.

<sup>13</sup> Williams v. Walton, 9 Cal. 142.

<sup>14</sup> Fairchild v. Doten, 42 Cal. 125.

<sup>15</sup> Cal. Code Civ. Pro., § 1283; Kettleman v. Treadway, 65 Cal. 505; Ryan v. Dougherty, 30 id. 218. Practice as to award of arbitrators stated in Motor Co. v. Cummings, 5 Wash. St. 206.

order of court, and the clerk must make the proper entries in the register.<sup>16</sup>

**§ 5265. Judgment on award.** Where a submission to arbitration is made an order of court under the Practice Act, the clerk may enter judgment on the award, in due time, without any further order of the court.<sup>17</sup> The report of a referee, and the award of an arbitrator, are in all essentials the same.<sup>18</sup> And a consent to submit a matter to arbitration does not imply a consent that the party in whose favor the award is made may enter judgment upon it in court as a matter of course.<sup>19</sup> After the expiration of five days from the filing of the award, upon the application of a party, and on filing an affidavit showing that notice of filing the award has been served on the adverse party or his attorney at least four days prior to such application, and that no order staying the entry of judgment has been served, the award must be entered by the clerk in the judgment-book, and thereupon has the effect of a judgment.<sup>20</sup> If a judgment on an award is entered by the clerk at the request of the party in whose favor it is rendered, within less than five days after the award is filed, and without notice to the other party, the prevailing party can not afterwards question its validity on the ground that it was irregularly entered.<sup>21</sup>

**§ 5266. Matters submitted.** The rule is general that arbitrators must pass upon all matters submitted, or their award will be invalid. If several matters are specified in the submission, and the award does not disclose that each is determined, it is defective on its face, and can be set aside on motion. But

<sup>16</sup> *Pieratt v. Kennedy*, 43 Cal. 393. Amendment of entry of submission. See *Cal. Academy Sciences v. Fletcher*, 99 Cal. 207. Submission of a cause to arbitration, made pending an action thereon, operates as a discontinuance of the action. *Draghicevich v. Vulicevich*, 76 Cal. 378.

<sup>17</sup> *Carsley v. Lindsay*, 14 Cal. 330; overruling *Heslep v. City of San Francisco*, 4 id. 1. A judgment entered upon an award not supported by a valid statutory agreement of submission to arbitration is absolutely void, and may be set aside by the court with or without a motion therefor, and execution thereof may be perpetually stayed. *Matter of Kreiss*, 96 Cal. 617.

<sup>18</sup> *Grayson v. Guild*, 4 Cal. 122. As to power of the court to modify or correct the award on motion, see Cal. Code Civ. Pro., § 1288.

<sup>19</sup> *Gunter v. Sanchez*, 1 Cal. 45.

<sup>20</sup> Cal. Code Civ. Pro., § 1286.

<sup>21</sup> *Hoogs v. Morse*, 31 Cal. 128.

if the submission is general of all matters in controversy, without specification, it is not necessary that the award should embrace any matters except those which are laid before the arbitrators. These last, however, must be passed upon, or the award will be void *in toto*, and be set aside upon a proper showing of the omission.<sup>22</sup>

§ 5267. **Must be in writing.** The submission must be in writing, and may be to one or more persons.<sup>23</sup> The award also must be in writing, signed by the arbitrators, or a majority of them, and delivered to the parties. And when the submission is made an order of court, the award must be filed with the clerk.<sup>24</sup>

§ 5268. **Objections to award.** Where an award is objected to on the ground that it embraces matters not in fact submitted, though within the general terms of submission, it lies with the objecting party to show affirmatively in what the arbitrators have exceeded their authority. Without such showing the award will be sustained.<sup>25</sup> If the party in whose favor an award of arbitrators is made voluntarily takes judgment on the award, and then receives the amount of the judgment in satisfaction of it, this is a waiver of any errors or misconduct on the part of the arbitrators.<sup>26</sup> If the parties upon the trial before the arbitrators submit by mutual consent matters not included in the written submission, and the arbitrators try such matters, neither party, after publication of the award, can object that the award exceeded the submission.<sup>27</sup>

§ 5269. **Organization.** All the arbitrators must meet and act together during the investigation; but when met, a majority may determine any question. Before acting they must be sworn before an officer authorized to administer oaths, faithfully and fairly to hear and examine the allegations and evidence of the parties in relation to the matters in controversy, and to make a just award according to their understanding.<sup>28</sup>

<sup>22</sup> Muldrow v. Norris, 12 Cal. 331.

<sup>23</sup> Cal. Code Civ. Pro., § 1282.

<sup>24</sup> Id., § 1286.

<sup>25</sup> See Blair v. Wallace, 21 Cal. 317.

<sup>26</sup> Hoogs v. Morse, 31 Cal. 128.

<sup>27</sup> Woods v. Page, 37 Vt. 252.

<sup>28</sup> Cal. Code Civ. Pro., § 1285.

§ 5270. **Power of arbitrators.** Arbitrators have power to appoint a time and place for hearing, to adjourn from time to time, administer oaths to witnesses, to hear the allegations and evidence of the parties, and to make an award thereon;<sup>29</sup> and to award costs.<sup>30</sup> The arbitrator must make his award within the time limited in the agreement, or both the arbitrator and court lose jurisdiction of the case, unless the parties stipulate in writing to extend the time.<sup>31</sup> Arbitrators have power to determine both the validity and amount of the claim in dispute.<sup>32</sup> And after an award has been once made and delivered, the arbitrators can not alter the same, even to correct mistakes, without the consent of the parties.<sup>33</sup> They have no common-law powers when appointed under the statute.<sup>34</sup>

§ 5271. **Principles of determination.** Arbitrators, under a general submission, are not bound to decide according to strict law; but where they intend to decide according to law, a mistake apparent on the face of the award is fatal.<sup>35</sup> If arbitrators state the reasons of their award, it will be presumed they intend to decide according to law.<sup>36</sup>

§ 5272. **Setting aside award.** Courts of equity, in the absence of statutes, will set aside awards for fraud, mistake, or accident. An award may be set aside for a mistake of law, when it appears on the face of the award.<sup>37</sup> Where the object of the submission is to make an end of litigation, and the award is uncertain and incomplete upon its face, it defeats the object of the submission, and must be set aside.<sup>38</sup> If the arbitrator rules upon questions of law, and refers the whole matter to the court for revision, and it is found that he mistook the

<sup>29</sup> Cal. Code Civ. Pro., § 1284.

<sup>30</sup> *Dudley v. Thomas*, 23 Cal. 365; *Jones v. Carter*, 8 Allen, 431.

<sup>31</sup> *Ryan v. Dougherty*, 30 Cal. 218.

<sup>32</sup> *Colcord v. Fletcher*, 50 Me. 398; see *Simons v. Mills*, 80 Cal. 118; *Springer v. Schultz*, 64 id. 454; *Fulmore v. McGeorge*, 91 id. 611.

<sup>33</sup> *Russ. on Arb.* 135; *Porter v. Scott*, 7 Cal. 312; *Dudley v. Thomas*, 23 id. 365.

<sup>34</sup> *Williams v. Walton*, 9 Cal. 145; *Bayne v. Morris*, 1 Wall. 97; *Talbott v. Hartley*, 1 Cranch C. C. 31.

<sup>35</sup> *Muldrow v. Norris*, 2 Cal. 74; 56 Am. Dec. 313.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Pierson v. Norman*, 2 Cal. 599.

law, his report will be set aside.<sup>39</sup> That the arbitrator did not act upon all the items or property of a partnership is no ground for vacating his award. Certainly not if the facts were not brought before him.<sup>40</sup>

§ 5273. **Revocation.** An agreement to submit matter to arbitration is, both at law and in equity, revocable before the award is given;<sup>41</sup> and it can not be made irrevocable by agreement of parties;<sup>42</sup> otherwise, it seems, of a submission by rule of court.<sup>43</sup> When entered as an order of court, the submission can not be revoked without the consent of both parties;<sup>44</sup> otherwise it may be revoked at any time before the award is made.<sup>45</sup>

§ 5274. **Submission in particular cases.** One partner can not bind his copartner by a submission of partnership matters to arbitration;<sup>46</sup> but such a submission would be good against the partner agreeing to it.<sup>47</sup> Whenever parties may by their own act transfer real property, or exercise any act of ownership with regard to it, they may refer any disputes concerning it to the decision of arbitrators, who may order the same acts to be done which the parties themselves might do by agreement.<sup>48</sup> When an agreement in writing is entered into under the section of the Practice Act,<sup>49</sup> to submit questions of difference relative to the partition of lands to the award of arbitrators, and the arbitrators meet and make their award, a court of equity will decree a specific performance of the award;<sup>50</sup> even though the party refusing to perform should agree to pay the penalty

<sup>39</sup> *Cushman v. Wooster*, 45 N. H. 410; *Pulliam v. Pensoneau*, 33 Ill. 375; 85 Am. Dec. 280.

<sup>40</sup> *Carsley v. Lindsay*, 14 Cal. 390; see *Valle v. Northern Missouri R. R. Co.*, 37 Mo. 445. See, as to grounds of setting aside an award, Cal. Code Civ. Pro., § 1287. Award not binding upon the parties, when. See *Stockton, etc., Agr. Works v. Insurance Co.*, 98 Cal. 557.

<sup>41</sup> 7 East, 607; 1 Bing. 89.

<sup>42</sup> *Tobey v. The County of Bristol*, 3 Story C. C. 800.

<sup>43</sup> *Masterson v. Kidwell*, 2 Cranch C. C. 669; *Sidlinger v. Kerkow*, 82 Cal. 42.

<sup>44</sup> Cal. Code Civ. Pro., § 1283.

<sup>45</sup> *Id.*; see *Cal. Academy Sciences v. Fletcher*, 99 Cal. 207; *Church v. Shanklin*, 95 id. 626.

<sup>46</sup> *Karthauss v. Ferrer*, 1 Pet. 222.

<sup>47</sup> *Jones v. Bailey*, 5 Cal. 345.

<sup>48</sup> *Blair v. Wallace*, 21 Cal. 317.

<sup>49</sup> Cal. Code Civ. Pro., § 1281.

<sup>50</sup> *Whitney v. Stone*, 23 Cal. 275.

agreed on.<sup>51</sup> If the submission provide that an award upon the matters submitted be made, or the condition of the bond be that the parties are bound, provided the award of such matters be made, then such proviso extends to all the matters submitted, and operates to render the submission conditional and the award binding only in case the arbitrators pass upon every subject either specially referred to them or brought to their notice under the general terms of the submission.<sup>52</sup> An action for the recovery of mining ground on public land is regarded as a "question of title to real property," and, therefore, can not properly be submitted to arbitration.<sup>53</sup>

**§ 5275. Umpire.** When matters in dispute are submitted to arbitration, with power for the arbitrators to appoint an umpire, the arbitrators have a right to select the umpire, either before or after the investigation of the matter has commenced, even though the articles of submission contain a clause providing for such selection in the event of a disagreement between the arbitrators.<sup>54</sup> An umpire is not to be called in until the original arbitrators have differed, and then only to decide the points on which they differ.<sup>55</sup> An umpire must hear the parties. His award made on the statement of the arbitrators is not binding.<sup>56</sup> And must give notice of the time and place of his proceeding.<sup>57</sup>

**§ 5276. Who may submit to arbitration.** Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them, except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.<sup>58</sup> An attorney-at-law as such, has authority to refer to arbitration a suit in which he is employed.<sup>59</sup>

<sup>51</sup> Whitney v. Stone, 23 Cal. 275.

<sup>52</sup> Muldrow v. Norris, 12 Cal. 331.

<sup>53</sup> Spencer v. Winselman, 42 Cal. 479; Cal. Code Civ. Pro., § 1281.

<sup>54</sup> Dudley v. Thomas, 23 Cal. 365.

<sup>55</sup> Traverse v. Beall, 2 Cranch C. C. 113.

<sup>56</sup> Taber v. Jenny. Sprague. 315.

<sup>57</sup> Thornton v. Chapman, 2 Cranch C. C. 244.

<sup>58</sup> Cal. Code Civ. Pro., § 1281; Higgins v. Kinneady, 20 Iowa, 474; Ryan v. Dougherty, 30 Cal. 218.

<sup>59</sup> Holker v. Parker, 7 Cranch, 436; Alexandria Canal Co. v. Swann, 5 How. (U. S.) 83; and see Green v. Darling, 5 Mason, 201. Case where an agent submitted to arbitration the question of damage done to land owned by the wife of his principal. Smith v. Sweeney, 75 N. Y. 291.

## CHAPTER IV.

### CONFESSION OF JUDGMENT.

§ 5277. **In general.** A judgment by confession may be entered without action, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed in this chapter. Such judgment may be entered in any court having jurisdiction for like amounts.<sup>1</sup> A statement in writing must be made, signed by the defendant, and verified by his oath, to the following effect: 1. It must authorize the entry of judgment for a specified sum; 2. If it be for money due, or to become due, it must state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due; 3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and show that the sum confessed therefor does not exceed the same.<sup>2</sup> The statement must be filed with the clerk of the court in which the judgment is to be entered, who must indorse upon it, and enter in the judgment-book, a judgment of such court for the amount confessed, with ten dollars costs. The statement and affidavit, with the judgment indorsed thereupon, becomes the judgment-roll.<sup>3</sup> Judgment by confession may also be entered in a Justice's Court for any amount within its jurisdiction.<sup>4</sup> The confession must specify the Justice's Court in which it is to be entered.<sup>5</sup> The statement and affidavit in all other respects is the same as in District Courts. If a transcript of such judgment be filed with the county clerk, a copy of the statement must be filed with it.<sup>6</sup>

<sup>1</sup> Cal. Code Civ. Pro., § 1132.

<sup>2</sup> Id., § 1133.

<sup>3</sup> Id., § 1134.

<sup>4</sup> Id., §§ 889, 1132, 1135.

<sup>5</sup> Id., § 889.

<sup>6</sup> Id., § 1135.



## § 5278. Statement and confession of judgment.

*Form No. 1183.*

[TITLE.]

I, C. D., defendant in the above-entitled action, do hereby confess judgment therein, in favor of A. B., the plaintiff in the said action, for the sum of ..... dollars, and authorize judgment to be rendered therefor against me, with legal interest thereon from this date.

This confession of judgment is for a debt justly due and owing to the said plaintiff, arising upon the following facts, to-wit [state facts specifically, with circumstances, date, place, etc.]

[SIGNATURE.]

State of ..... }  
County of ..... } ss.:

C. D., being duly sworn, deposes and says as follows:

I am the person who signed the above statement, and I am indebted to the said A. B. in the sum of ..... dollars in said statement mentioned; and the facts stated in the above confession and statement are true.<sup>7</sup>

[JURAT.]

[SIGNATURE.]

§ 5279. Collateral attack. Every judicial proceeding taken with intent to delay or defraud any creditor or other person of his demands is void against all creditors of the debtor and their successors in interest, and against any person upon whom the estate of the debtor devolved, in trust for the benefit of others than the debtor.<sup>8</sup> A confession of judgment made for such a purpose will be held void as to such creditor upon a direct proceeding taken by him to avoid it.<sup>9</sup> It is not necessary that

<sup>7</sup> As to the form of statement on confession of judgment, in the case of money lent, see *Union Bank v. Bush*, 36 N. Y. 631. For goods sold, see *Gandall v. Finn*, 1 Keyes, 217; S. C., 33 How. Pr. 444. If a statement is sufficiently explicit, within the language and meaning of the Code, the omission of a schedule therein referred to as "annexed" will not invalidate the judgment. *Clements v. Gerow*, 1 Keyes, 297. The Supreme Court has power to amend a statement and confession of judgment. *Mitchell v. Van Buren*, 27 N. Y. 300; *Union Bank v. Bush*, 36 N. Y. 631.

<sup>8</sup> Cal. Civ. Code, § 3439.

<sup>9</sup> *Ryan v. Daly*, 6 Cal. 239; *Lee v. Figg*, 37 id. 328; 99 Am. Dec. 271. If confessions of judgment are prohibited by the insolvent laws, the assignee in insolvency can have them adjudged void upon a proper proceeding for that purpose, but attaching creditors can

the plaintiff in such action should be either a judgment or execution creditor. A lien acquired by attachment suffices.<sup>10</sup> Where a judgment was rendered by confession in open court, upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, they can not, at the instance of one not a party to the judgment, be invoked to set aside or show the judgment was a nullity.<sup>11</sup> Where judgment is taken by confession in good faith and for value, it can not be impeached for fraud between other parties.<sup>12</sup> To be vacated, the judgment must be wholly void. One sufficient item will not avoid it, if the rest be good.<sup>13</sup> Judgment can not be impeached by attaching creditor; only by holder of judgment.<sup>14</sup>

§ 5280. **Insufficient statements.** A statement for confession of judgment, to the effect that the indebtedness is upon a note, etc., is insufficient. So, where the statement is that the indebtedness is for goods sold and delivered, and money had and received, it is insufficient in this, that it does not show the kind or quantity or price of the goods, or time of sale, or when the money was received, or under what circumstances, or how much of the indebtedness is for money and how much for goods; and the judgment confessed is *prima facie* fraudulent.<sup>15</sup> For cash loaned, without giving particulars of loans, was held insufficient.<sup>16</sup> So for balance of account, without stating any facts as to sales out of which it arose.<sup>17</sup> It should appear by some form of direct statement that at the very instant the judgment was confessed the relation of debtor and creditor existed, and to the extent stated in the judgment.<sup>18</sup> To rebut the presump-

not assail them in equity if the judgments confessed were for debts justly due. *Pehrson v. Hewitt*, 79 Cal. 594.

<sup>10</sup> *Scales v. Scott*, 13 Cal. 76; *Heyneman v. Dannenberg*, 6 id. 376; 65 Am. Dec. 519.

<sup>11</sup> *Cloud v. El Dorado Co.*, 12 Cal. 133; 73 Am. Dec. 526.

<sup>12</sup> *Kirby v. Fitzgerald*, 31 N. Y. 417.

<sup>13</sup> *Frost v. Koon*, 30 N. Y. 428.

<sup>14</sup> *Bentley v. Goodwin*, 15 Abb. Pr. 82. Impeachment of judgment by confession. See *Miller v. Bank*, 2 Oreg. 291; 3 id. 24; *Allen v. Norton*, 6 id. 344.

<sup>15</sup> *Oordier v. Schloss*, 18 Cal. 576; see, also, *Wilcoxon v. Burton*, 27 id. 233; 87 Am. Dec. 66; *Richardson v. Fuller*, 2 Oreg. 179; *Puget Sound Nat. Bank v. Levy*, 10 Wash. St. 499.

<sup>16</sup> *McDowell v. Daniels*, 38 Barb. 143.

<sup>17</sup> *Miller v. Earle*, 24 N. Y. 110, 112.

<sup>18</sup> *Denver v. Burton*, 28 Cal. 549.

tion of fraud, the facts proved must be consistent with the averments of the statement, and in support of them.<sup>19</sup>

§ 5281. **Joint debtor.** A judgment by confession of one joint debtor will not reach the joint property, but be effective only against him who authorizes its entry, as such a judgment is unauthorized.<sup>20</sup>

§ 5282. **Judgment creditor, proceedings by.** A judgment creditor, made such by confession of judgment, who seeks to reach money in the hands of the junior judgment creditors, upon the ground that he has a prior lien upon the same, must aver in his complaint that at the time his judgment was rendered the amount for which it was rendered was unpaid and due.<sup>21</sup>

§ 5283. **On award.** A judgment may be entered by confession for the amount specified in the award, in the same way that it may for the sum mentioned in a bond, note, or other instrument, but that is a judgment by confession.<sup>22</sup>

§ 5284. **Promissory note.** Where judgment is confessed on a note, a portion of the consideration being advanced from time to time after the date of the note, which drew interest on the whole amount from date, a portion of the interest is fraudulent, and the entire note is void against creditors.<sup>23</sup> That notes specified were given for purchase of a described indebtedness, without specifying original consideration, was held sufficient.<sup>24</sup>

§ 5285. **Setting aside confessions.** An application by a defendant, or by a judgment creditor, to set aside his confession of judgment, should show that the claim was not just, and that the judgment ought not to have been confessed.<sup>25</sup> Whether he could thus impeach his former acts doubted.<sup>26</sup> A junior judgment creditor has no right to join with the defendant in such application.<sup>27</sup> In a suit to set aside a judgment confessed by a party to defraud his creditors, it is not necessary that

<sup>19</sup> Pond v. Davenport, 44 Cal. 487.

<sup>20</sup> Flannery v. Anderson, 4 Nev. 437; Nev. Pr. Act, § 32.

<sup>21</sup> Denver v. Burton, 28 Cal. 549.

<sup>22</sup> Gunter v. Sanchez, 1 Cal. 48.

<sup>23</sup> McKenty v. Gladwin, 10 Cal. 227. As to sufficiency of statement on a promissory note, see Acker v. Acker, 1 Keyes, 291; Puget Sound Nat. Bank v. Levy, 10 Wash. St. 499.

<sup>24</sup> Kirby v. Fitzgerald, 31 N. Y. 417.

<sup>25</sup> Arrington v. Sherry, 5 Cal. 513.

<sup>26</sup> Id.

<sup>27</sup> Id.

plaintiff should be either a judgment or execution creditor. A lien acquired by attachment suffices. A slight mistake in the computation of interest, the date being given, is no evidence of fraud.<sup>28</sup> A judgment by confession upon a statement which does not sufficiently state the facts out of which the indebtedness arose, nor that the amount confessed was justly due, is not a nullity on its face, and can only be called in question by the creditors of the defendant on the ground of fraud in a direct proceeding for that purpose.<sup>29</sup> A general allegation that the confession of judgment was to hinder, delay, and defraud is not sufficient; where fraud is alleged, the facts must be set forth.<sup>30</sup> A debtor may prefer a particular creditor by giving a confession of judgment, unless prohibited by statute. It is not necessary to annex a statement on which a confession of judgment is rendered in a proceeding to set aside the confession upon the ground of insufficiency of such statement.<sup>31</sup>

§ 5286. **Several judgments.** Where the same fraudulent debtor confesses several fraudulent judgments in several courts, it would not be necessary for a creditor to bring a different suit in each different court.<sup>32</sup> In such cases the question of fraud, if there be any proof, is for the jury; otherwise for the court.<sup>33</sup>

§ 5287. **Sufficiency of statement.** The statute requires the debtor to state enough of facts to enable creditors to inquire into the transaction.<sup>34</sup> General specification of loans, and purposes for which they were made, was held sufficient;<sup>35</sup> so a general statement that indebtedness was in respect of sale of interest in partnership property.<sup>36</sup> So as to facts as to numerous sales, conducing to a balance, for which judgment is confessed.<sup>37</sup>

<sup>28</sup> *Scales v. Scott*, 13 Cal. 76.

<sup>29</sup> *Lee v. Figg*, 37 Cal. 328; 99 Am. Dec. 271.

<sup>30</sup> *Meeker v. Harris*, 19 Cal. 289.

<sup>31</sup> *Vannice v. Greene*, 14 Iowa, 262.

<sup>32</sup> *Uhlfelder v. Levy*, 9 Cal. 615.

<sup>33</sup> *King v. Davis*, 34 Cal. 100.

<sup>34</sup> *McDowell v. Daniels*, 38 Barb. 143.

<sup>35</sup> *Frost v. Koon*, 30 N. Y. 428.

<sup>36</sup> *Thompson v. Van Vechten*, 27 N. Y. 568. Confession sustained stating facts sufficient to sustain liability by necessary implication. *Read v. French*, 28 N. Y. 285. Confession specifying consideration of notes in general terms upheld. *Ely v. Cooke*, 28 N. Y. 365; *Kellogg v. Cowing*, 33 id. 408.

<sup>37</sup> *Neusbaum v. Keim*, 24 N. Y. 325; see, also, *Curtis v. Corbit*, 25

§ 5288. **Void judgments.** A judgment confessed for the purpose of hindering, delaying, or defrauding creditors is void as to such creditors.<sup>38</sup> The authority given by statute for entering judgment by confession must be strictly pursued.<sup>39</sup>

§ 5288a. **Judgment by confession — miscellaneous.** Under section 416, Washington Code of Procedure, in an action upon a contract against copartners, when one of the partners confesses judgment without the consent of the others, judgment is authorized against all the partners, to be enforced against the partnership property, and against the separate property of the partner making the confession.<sup>40</sup> Strangers to a judgment by confession are not concluded by its date nor by its recitals.<sup>41</sup> The enforcement of a judgment entered by confession, without a substantial compliance with the statute authorizing such entry, may be enjoined at the suit of a third party prejudiced thereby.<sup>42</sup> No Colorado statute authorizes a clerk to enter a judgment in vacation by confession in any cause against a county, and a judgment so entered against a county will not furnish a basis for the issue of bonds.<sup>43</sup>

§ 5288b. **Judgment by consent.** A judgment by consent, in an action in which the court has jurisdiction of the subject-matter and of the parties, will bind them and their privies as effectually as if it had been entered after a trial of the issues.<sup>44</sup> But it will not be presumed in support of a judgment that it was given by consent. This must be shown affirmatively.<sup>45</sup>

How. Pr. 58. So as to general statement as to notes indorsed for accommodation of confessor. *Hopkins v. Nelson*, 24 N. Y. 518.

<sup>38</sup> *Ryan v. Daly*, 6 Cal. 238; *Scales v. Scott*, 13 id. 76. A judgment by confession is void unless the statement authorizing its entry is signed by the person against whom the judgment is rendered. *Reynolds v. Lincoln*, 71 Cal. 183.

<sup>39</sup> *Chapin v. Thompson*, 20 Cal. 681; *Richards v. McMillan*, 6 id. 419; 65 Am. Dec. 521; *Cordier v. Schloss*, 18 Cal. 576; *Bacon v. Raybould*, 4 Utah, 357; *Schuster v. Rader*, 13 Col. 329.

<sup>40</sup> *Bank of Shelton v. Willey*, 7 Wash. St. 535; compare *Richardson v. Fuller*, 2 Oreg. 179.

<sup>41</sup> *Schuster v. Rader*, 13 Col. 329.

<sup>42</sup> Id.; and see *Ling v. King*, 91 Ill. 571; *Brown v. Hathaway*, 10 Minn. 303.

<sup>43</sup> *Abbott v. Board of Commrs.*, 18 Col. 6.

<sup>44</sup> *Partridge v. Shepard*, 71 Cal. 470; and see § 4948, *ante*; *McOreery v. Fuller*, 63 Cal. 30.

<sup>45</sup> *San Francisco Sav. Union v. Myers*, 76 Cal. 624.

## CHAPTER V.

### CONTEMPT OF COURT.

§ 5289. **In general.** Contempt is a willful disregard or disobedience of a public authority. Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, and for disturbing them in their proceedings.<sup>1</sup> In California the statute enumerates certain acts and omissions which are declared to be contempts of the authority of the court.<sup>2</sup> Any judicial officer may punish for contempt in the cases provided for in the Code.<sup>3</sup> If a court having jurisdiction should issue an erroneous order, a disobedience of it is a contempt.<sup>4</sup> Any publication pending a suit, reflecting either upon the court, the jury, the parties, the counsel, etc., with reference to the suit, or tending to influence the decision of the cause, though not aspersive of the court, is a contempt.<sup>5</sup> To call another a liar in the presence of the court, and in the hearing of its officers, is a contempt. Violent language and an assault made, in a hall adjoining a courtroom, and within the hearing of the court, it

<sup>1</sup> Bouv. L. Dict.; and see *Matter of Shortridge*, 99 Cal. 526.

<sup>2</sup> Code Civ. Pro., §§ 1209, 1210; and see *Ex parte Abbott*, 94 Cal. 333.

<sup>3</sup> Id., § 178.

<sup>4</sup> In *re Cohen & Jones*, 5 Cal. 494; see *Batchelder v. Moore*, 42 id. 412. But a party can not be punished for a contempt in violating a void or unlawful order. *Brown v. Moore*, 61 Cal. 432; *Ex parte Brown*, 97 id. 83; and see *State v. Pall*, 5 Wash. St. 387; *Gordon v. Buckloo*, 92 Cal. 481; *Hennessy v. Nicol*, 105 id. 138; *North Dakota v. Davis*, 2 N. Dak. 472.

<sup>5</sup> *Hollingsworth v. Duane*, Wall. C. C. 100; and see *United States v. Duane*, id. 102. See, as to order to execute a release or conveyance, *Morris v. Walsh*, 9 Bosw. 636. The above is an early authority, and will hardly stand the test of the more recent and more liberal decisions. See *Ex parte Barry*, 85 Cal. 603; *Dalley v. Superior Ct.*, 112 id. 94. Abuse of trial judge in a brief filed in the appellate court will be treated as contempt of the latter court. *Sears v. Starbird*, 75 Cal. 91; and see *Friedlander v. Mining Co.*, 61 id. 116.

then being in session, is a contempt, which the court may punish, within the meaning of the act.<sup>6</sup> When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in presence of the court, the facts must be shown by affidavits, or by a statement by the referees or arbitrators, or other judicial officer.<sup>7</sup> When the contempt is not committed in the view and presence of the court a warrant of attachment may be issued, or without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer or such notice or order to show cause.<sup>8</sup> Whenever a warrant of attachment is issued, the court or judge must direct, by an indorsement thereon, that the person named may be let to bail for his appearance, in a sum named in such indorsement.<sup>9</sup> When the person arrested has been brought up or appeared, the court or judge must proceed to investigate the charge, and must hear the answer, and witnesses may be examined for and against him, and adjournments may be had from time to time if necessary. Whether the person is guilty of the contempt charged must be determined from the answer and evidence taken, and if adjudged guilty, he may be fined in a sum not exceeding five hundred dollars, or imprisoned not exceeding five days, or both.<sup>10</sup> When the contempt consists in the omission of an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, and in that case the act must be specified in the warrant of commitment.<sup>11</sup>

<sup>6</sup> United States v. Emerson, 4 Cranch C. C. 188.

<sup>7</sup> Cal. Code Civ. Pro., § 1211.

<sup>8</sup> Id., § 1212.

<sup>9</sup> Id., § 1213. As to service of the warrant, letting to bail, condition of the undertaking, etc., see Id., §§ 1214-1216.

<sup>10</sup> Cal. Code Civ. Pro., §§ 1217, 1218.

<sup>11</sup> Id., § 1219. For enumeration of contempts, consult Cal. Code Civ. Pro., §§ 1209, 1210, 1211, and 1000; Tomlin's Law Dict.; Ruff v. Rader, 2 Mont. 211; State v. District Ct., 13 Id. 347; State v. Kaiser, 20 Oreg. 50; Territory v. Murray, 7 Mont. 251; *In re Mac Knight*, 11 Id. 126; 28 Am. St. Rep. 451. The use of profanity by



**§ 5290. Commitment for contempt for disrespectful language.**  
*Form No. 1184.*

[TITLE.]

The people of the state of California, to the sheriff of .....  
 county, greeting:

Whereas, an action was duly commenced in the said court on the ..... day of ....., 18.., between A. B. as plaintiff and C. D. as defendant, for the purpose of [state purpose of the action], and was regularly pending in said court on the ..... day of ....., 18..; and whereas, on that day, during the hearing of said action, and in the presence and hearing of said court, while said court was in session, R. N., a witness summoned in said action [or the plaintiff, or defendant, or counsel, or a by-stander, or otherwise, as the case may be], did publish, utter, and say aloud and in the hearing of the court and others, that [here insert disrespectful or contemptuous language], of and concerning said court, with the view, on the part of the said R. N., to bring this court and its proceedings in said action into contempt, and that such misconduct did, in fact, impair, hinder, and prejudice the rights and remedies of A. B., the plaintiff [or of C. D., the defendant] in said action, and did, in fact, interrupt, impede, and hinder the course of justice in the hearing and deliberation of the court in said action, and that the said R. N. thereby had become liable to punishment for said disrespectful and contemptuous language, pursuant to the statute in such case made and provided; and whereas, the said court did, at the same time by its order, then duly entered, adjudge and declare that the said R. N. had been guilty of a contempt of said court by the use of said disrespectful and contemptuous language, and did order that the said R. N. be punished for his said contempt by imprisonment in the common jail of ..... county for the term of ..... days:

Now, therefore, you are required and commanded, and we do warrant and enjoin you, that you forthwith attach the said

witnesses before a referee may be punished as a contempt of court. *In re Haldorn*, 10 Mont. 222. That to obtain an opinion of the court affecting the rights of persons, not parties to the pretended controversy, would be punishable as a contempt, see *Lord v. Veazle*, 8 How. Pr. 251; *Cleveland v. Chamberlain*, 1 Black, 419. That the clerk may have an attachment for nonpayment of his fees, see *Lee v. Patterson*, 2 Oranch C. O. 190.



R. N. and commit him to the common jail of ..... county, and detain him there for the term of ..... days, as a punishment for his said contempt of the ..... court, and for such arrest, imprisonment, and detention, this shall be your sufficient warrant.

Witness, the Hon. J. C., judge of the ..... court, at the city hall, in the city and county of ....., this ..... day of ....., 18...

[SIGNATURE.]

By the special order of the court.

[SIGNATURE OF CLERK.]

**§ 5291. Affidavit.** It is essential to the validity of proceedings in contempt, whereby a person is subjected to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere intendments and presumptions will not be indulged in their support; and if the affidavit be defective in stating the facts, it is equivalent to no affidavit.<sup>12</sup>

**§ 5292. Commitment should state what.** A commitment for contempt for refusing to obey an order of court, commanding the imprisonment of the party in contempt until he shall comply with the order, should set forth that it is in the power of the party to comply.<sup>13</sup> Though courts are exclusive judges of their own contempts, still a party can not be imprisoned for neglecting or refusing to do what it appears it is out of his power to perform.<sup>14</sup> The order of the court must show upon its face the facts upon which the exercise of the power to punish is based.<sup>15</sup> It is a contempt for a party to refuse to obey or answer the writ, on the ground that he is a witness attending on another court.<sup>16</sup>

<sup>12</sup> *Batchelder v. Moore*, 42 Cal. 412. Sufficiency of affidavit. See *Ex parte Ah Men*, 77 Cal. 198; *Hedges v. Superior Ct.*, 67 Id. 405; *Ex parte Acock*, 84 Id. 50. The jurisdiction of a court to adjudge a contempt committed out of its presence does not depend upon the form of the affidavit which sets the proceeding in motion. When the order to show cause is served, the defendant can appear and answer any contempt alleged against him. *Golden Gate, etc., Co. v. Superior Ct.*, 65 Cal. 187.

<sup>13</sup> *Ex parte Cohen*, 6 Cal. 318; *McCartan v. Van Syckel*, 10 Bosw. 694.

<sup>14</sup> *Adams v. Haskell*, 6 Cal. 316; 65 Am. Dec. 517.

<sup>15</sup> *People v. Turner*, 1 Cal. 152.

<sup>16</sup> *Page v. Randall*, 6 Cal. 32.

§ 5293. **Disobedience of process.** Where the process of a court, as an execution commanding the sheriff to deliver possession of a chattel, has been finally and completely executed, the power of the sheriff under it, and the authority of the court to enforce it, cease; and a wrongdoer afterwards trespassing upon the person thus put in possession can not be deemed guilty of contempt for disobedience to the process of the court.<sup>17</sup>

§ 5294. **Evidence of contempt.** When the contempt is not committed in *facia curiae*, it must be proved by affidavits from persons who witnessed it.<sup>18</sup> A clear case must be shown.<sup>19</sup> Where the facts which are supposed to establish misconduct in an attorney are susceptible of explanation showing them consistent with professional propriety, the Superior Court has no power to adjudge the attorney guilty of contempt, and to strike him from the rolls, without affording him an opportunity for explanation.<sup>20</sup> No intendments of material facts should be indulged in.<sup>21</sup>

§ 5295. **Injunction, violation of.** When an injunction, granted on an *ex parte* application, was modified on motion of defendant, without notice to plaintiff, on defendant's giving bond, it was held that subsequent acts of defendant, in violation of the original injunction, were not in contempt. The remedy of the plaintiff, if there were error in the order modifying the injunction, is by appeal, but he can not have a *mandamus* to compel the issuance of attachment for contempt.<sup>22</sup> A violation of an injunction, induced by the stratagem of the plaintiff, is not ground for an attachment.<sup>23</sup> Where the court granted an injunction, from the order granting which the defendant appealed, and then disobeyed the injunction, whereupon plaintiff asked for an attachment for contempt, which was re-

<sup>17</sup> Loring v. Illsley, 1 Cal. 24.

<sup>18</sup> 7 Dane Abr. 307. Necessity of affidavit. See State v. Kaiser, 20 Oreg. 50. Insufficient affidavit. State v. Allen, 14 Wash. St. 684.

<sup>19</sup> *In re* Judson, 3 Blatchf. 148. A mere preponderance of evidence is not enough. Matter of Buckley, 69 Cal. 1. As to court not hearing collateral evidence, see United States v. Dodge, 2 Gall. 313; Thornton v. Davis, 4 Cranch C. C. 500.

<sup>20</sup> Fletcher v. Daingerfield, 20 Cal. 427.

<sup>21</sup> Matter of Metcalf v. Messenger, 46 Barb. 325.

<sup>22</sup> Fremont v. Merced Min. Co., 9 Cal. 18.

<sup>23</sup> Sparkman v. Higgins, 2 Blatchf. 29.

fused on the ground that the appeal superseded the injunction, it was held that a *mandamus* may issue to compel the district judge to issue the attachment, the plaintiff's remedy by appeal being inadequate.<sup>24</sup> The Superior Court alone has jurisdiction to try and punish for a contempt for the violation of an injunction issued out of the said court.<sup>25</sup>

§ 5296. **Jurisdiction.** Every court has, while engaged in the performance of its lawful functions, as an incident to its judicial character, the authority to preserve order, decency, and silence in its presence; and in such case may apprehend and punish an offender without further examination or proof; but where the offense is committed out of court, the party is entitled to a notice and a hearing in his defense.<sup>26</sup> So of authority to punish a counsel for interrupting the proceedings at the trial.<sup>27</sup> The Superior Courts have jurisdiction to punish for contempts of their process and to issue such writs as are necessary to the exercise of that jurisdiction.<sup>28</sup> This power was designed not only to protect the court from contempt of its authority, but to give a party injured an additional remedy in the action for the restoration of what he was entitled to by the judgment.<sup>29</sup> The jurisdiction to commit for contempt is derived from the original order in which the proceedings are founded, not from the order to show cause why the party should not be punished.<sup>30</sup> Copies of the affidavits upon which

<sup>24</sup> Merced Min. Co. v. Fremont, 7 Cal. 130.

<sup>25</sup> People v. County Judge of Placer County, 27 Cal. 151. See cases where defendant was held liable for contempt in cases of violation of injunction: Ewing v. Johnson, 34 How. Pr. 202; Battermann v. Finn, 32 id. 501; see, also, Neale v. Osborne, 15 id. 81; People v. Sturtevant, 9 N. Y. 263; Wheeler v. Gilsey, 35 How. Pr. 139; Eureka Lake, etc., Co. v. Superior Ct., 66 Cal. 311; Hobbs v. Amador & S. C. Co., id. 161; Johnson v. Superior Ct., 65 id. 567; Havemeyer v. Superior Ct., 87 id. 267; Golden Gate, etc., Co. v. Superior Ct., 65 id. 187. Each act violative of an injunction is a separate contempt. Id.

<sup>26</sup> *Ex parte* Field, 1 Cal. 187.

<sup>27</sup> Heerdt v. Westmore, 2 Robt. 697.

<sup>28</sup> *In re* Cohen & Jones, 5 Cal. 494; Pitt v. Davison, 37 N. Y. 235.

<sup>29</sup> People v. Dwinelle, 29 Cal. 632. Power to punish for contempts. See, also, *Ex parte* Latimer, 47 Cal. 131; *Ex parte* Smith, 53 id. 204; *Ex parte* Bergman, 3 Wyo. 396; People v. Carrington, 5 Utah, 531.

<sup>30</sup> Myers v. James, 3 Abb. Pr. 301.

the application is founded should be served with the attachment on the order.<sup>31</sup> A judge out of court can not punish as for contempt a disobedience of an order made by him in a statutory proceeding, unless authority so to punish is expressly conferred by law.<sup>32</sup> A party can not be punished for a contempt in violating an order which the court had no jurisdiction to make.<sup>33</sup>

§ 5297. **Noncompliance with mandamus.** An attachment will not be issued against a district judge for noncompliance with a writ of *mandamus*, by which he was directed to vacate an order expelling the relator from the bar, and reinstate him in his office of attorney, when it does not appear from the papers on which the motion for the attachment is founded that any application has been made to the court to vacate the order as commanded by the writ of *mandamus*, and where it appears that, so far as the action of the judge in vacation is concerned, he has in substance complied with the command of the writ of *mandamus*; and in such case it will not be deemed a disobedience of the writ that the court has again expelled the relator for reasons alleged to have arisen after the issuing of the writ.<sup>34</sup> So, for not having obeyed a peremptory writ of *mandamus*, where this has been adjudged superseded by a writ of error.<sup>35</sup>

§ 5298. **Order, how reviewed.** A commitment for contempt for refusing to obey an unlawful order of court can be reviewed and set aside by a Superior Court.<sup>36</sup> Where an order was made by the District Court of the eighth judicial district, whereby A. was ordered to be imprisoned forty-eight hours and fined five hundred dollars for contempt of court, without setting forth any of the facts whereon the order was based, it was held that a *certiorari* should issue to remove the proceedings for review into the Supreme Court; and further, that a *mandamus*

<sup>31</sup> Matter of Smethurst, 2 Sandf. 724.

<sup>32</sup> People v. Brennan, 45 Barb. 344.

<sup>33</sup> People v. O'Neil, 47 Cal. 109; see § 5289, *ante*; State v. Evans, 14 Wash. St. 114.

<sup>34</sup> *Ex parte* Field, 1 Cal. 188.

<sup>35</sup> United States v. Kendall, 5 Cranch O. O. 385; see Spencer v. Lawler, 79 Cal. 215.

<sup>36</sup> *Ex parte* Rowe, 7 Cal. 181.

was not a proper remedy in such case.<sup>37</sup> It is the right and duty of the Supreme Court, on *habeas corpus*, to review the decisions of inferior courts, in cases of contempt, as well as in others.<sup>38</sup> But an order of court adjudging a party guilty of contempt is not appealable.<sup>39</sup>

§ 5299. **Order conclusive.** The judgment and orders of the court or judge made in cases of contempt are final and conclusive.<sup>40</sup> The law regards the substance more than the form, and where the proceeding, though in form a case of contempt, is in substance a private right, the appellate court will compel the court below to issue an attachment to punish a contempt.<sup>41</sup> Every court empowered to punish for contempt is not the sole and final judge in all cases of alleged contempt.<sup>42</sup> An order of court adjudging a party guilty of contempt should always show upon its face the facts upon which the exercise of the power is based and the adjudication is made.<sup>43</sup> Whenever an order of the District Court fining and imprisoning for contempt does not specify on its face wherein the contempt existed, it will be reversed on *certiorari*.<sup>44</sup>

§ 5300. **Proceedings.** The mode of proceeding to punish the editor of a newspaper for contempt in publishing an article re-

<sup>37</sup> *People v. Turner*, 1 Cal. 152; see *Ex parte Field*, id. 188. In *Batchelder v. Moore*, 42 Cal. 413, the Supreme Court reviewed on *certiorari*, and set aside a judgment for contempt, on the ground that the court exceeded its jurisdiction. See, also, *People v. O'Neil*, 47 Cal. 110.

<sup>38</sup> *Ex parte Rowe*, 7 Cal. 181; *In re Spencer*, 82 id. 110; *Ex parte Hollis*, 59 id. 405; compare *Matter of Shortridge*, 99 id. 526; *Ex parte Vance*, 88 id. 281; *Ex parte Cohn*, 55 id. 193; *Ex parte Gordon*, 92 id. 478.

<sup>39</sup> *Aram v. Shallenberger*, 42 Cal. 275; *Cosby v. Superior Ct.*, 110 id. 45; *Teller v. People*, 3 West Coast Rep. 132; *Tyler v. Connolly*, 65 Cal. 28. Otherwise under section 791, Washington Code of Procedure. *State v. Allen*, 14 Wash. St. 684.

<sup>40</sup> Cal. Code Civ. Pro., § 1222; *Ex parte McCarthy*, 29 Cal. 399; *Dewey v. Superior Ct.*, 81 id. 64; *Ex parte Ah Men*, 77 id. 198; *Ex parte Acock*, 84 id. 50; and see *Ex parte Clark*, 110 id. 405.

<sup>41</sup> *Merced Mining Co. v. Fremont*, 7 Cal. 130.

<sup>42</sup> *Ex parte Rowe*, 7 Cal. 175.

<sup>43</sup> *People v. Turner*, 1 Cal. 152.

<sup>44</sup> *Ex parte Field*, 1 Cal. 187. Review of contempt proceedings on *certiorari*. See *State v. District Ct.*, 13 Mont. 347; *In re MacKnight*, 11 id. 126; 28 Am. St. Rep. 451.

flecting upon a court of justice is, the prosecutor first proves by affidavit that the paper was published at the office of defendant, and that he is editor. Defendant is then called upon by rule to show cause why an attachment should not issue. On this rule he may controvert the fact, or defend on legal grounds. But if it appears that a contempt has been committed, an attachment will be directed, and where the defendant is brought in by it, he may demand that the prosecutor may file interrogatories, and if by his answers on oath he purges himself from criminality, he must be discharged. But interrogatories can not be forced upon him. If he will not ask them, and the contempt is proved by affidavit or other testimony of the prosecutor, the court will give judgment against him.<sup>45</sup> Where the plaintiff proceeded, under section 239 of the Practice Act, to examine his judgment debtor as to a judgment held by him against A., and after examination obtained an order to apply the same to the judgment of plaintiff, it seems that it is not necessary to make A. a party to the proceeding.<sup>46</sup>

§ 5301. **Re-entry on lands.** The Superior Courts have jurisdiction to punish for contempt persons who re-enter upon a tract of land after having been dispossessed therefrom by a judgment and process of a court of competent jurisdiction.<sup>47</sup> It is essential that the person accused be one who has been

<sup>45</sup> *Hollingsworth v. Duane*, Wall. C. C. 77; see *United States v. Duane*, id. 102.

<sup>46</sup> *Adams v. Hackett*, 7 Cal. 187. As to the proceedings in cases of contempt, consult Cal. Code Civ. Pro., §§ 1209-1222; *Temple v. Superior Ct.*, 70 Cal. 211; *Spencer v. Lawler*, 79 id. 215; *Ex parte Cottrell*, 59 id. 420. A proceeding to punish for contempt is in its nature a criminal one, and the charge and finding thereon, and the judgment of the court, are to be strictly construed in favor of the accused. *Schwarz v. Superior Ct.*, 111 Cal. 106; and see *In re Filkl*, 80 id. 201; *Ex parte Hollis*, 59 id. 405; *Ex parte Gould*, 99 id. 360; 37 Am. St. Rep. 57. Although a court has ample power to protect itself in the administration of justice after a contempt has been committed, it is not proper practice to command a person not to commit a contempt. *Dalley v. Superior Ct.*, 112 Cal. 94. A contempt is presented, as matter of practice, in the cause or proceeding out of which it arose, and not as a separate proceeding with a title of its own. *Ex parte Ah Men*, 77 Cal. 198.

<sup>47</sup> Cal. Code Civ. Pro., § 1210; *People v. Dwinelle*, 29 Cal. 632; *Temple v. Superior Ct.*, 70 id. 211; compare *Larrabee v. Selby*, 52 id. 506.

dispossessed or ejected.<sup>48</sup> A person against whom a judgment is recovered in ejectment, and who is removed from the land by a writ of restitution, is not guilty of a contempt for re-entering on the land, if an event has occurred after the judgment and before the re-entry which confers upon him the right of possession.<sup>49</sup>

§ 5302. **Refusal to pay money.** Where, in the regular course of judicial proceedings before a court of general jurisdiction, a party having notice of the proceedings has been ordered by the judgment to pay a certain sum of money, and in default of obedience to the order has been committed for contempt, he can not, on application to the Supreme Court for a writ of *habeas corpus*, question the regularity of the acts; the power of the court below to make the order is the only question.<sup>50</sup> In a suit for divorce, the court has power to order the husband to pay money to the wife for her support during the litigation, and for counsel fees and other legal expenses; and such order may be enforced by imprisonment for contempt, in case of refusal to pay.<sup>51</sup> Where a party to a divorce suit fails to pay money into the hands of the clerk, upon an order of court directing the payment, it seems an attachment may issue without summoning the party to show cause why it should not issue,<sup>52</sup> so for the payment of alimony.<sup>53</sup> A party can not be imprisoned for neglecting or refusing to do what clearly appears not to be in his power to perform; such as an order to pay into court certain moneys, when it is shown he did not have the moneys in question when the order was made.<sup>54</sup>

<sup>48</sup> *Batchelder v. Moore*, 42 Cal. 412.

<sup>49</sup> *People v. Dwinelle*, 29 Cal. 632; *Mahoney v. Van Winkle*, 33 id. 448.

<sup>50</sup> *Ex parte Perkins*, 18 Cal. 60.

<sup>51</sup> *Id.*

<sup>52</sup> *Kernodle v. Cason*, 25 Ind. 362.

<sup>53</sup> *Ward v. Ward*, 6 Abb. Pr. (N. S.) 79.

<sup>54</sup> *Adams v. Haskell*, 6 Cal. 316; 65 Am. Dec. 517; *Gallaud v. Gallaud*, 44 Cal. 475; *Matter of Wilson*, 75 id. 580. Contempt in refusing to turn over assets to receiver. See *Ex parte Hollis*, 59 Cal. 405; *State v. Winder*, 14 Wash. St. 114. Failure to pay over money held in trust. *Williams v. Dwinelle*, 51 Cal. 442. A decree for the payment of money in probate proceedings can not be enforced as for a contempt, an execution being the proper process. *Rostel v. Morat*, 19 Oreg. 181.



§ 5303. **Service of order.** In proceedings to punish the defendant for a contempt for refusing to comply with the judgment, personal service of the order to show cause why the defendant should not be punished is not indispensable,<sup>55</sup> and interrogations are not necessary.<sup>56</sup> But there must be service of the order, or notice, or attachment to answer.<sup>57</sup>

§ 5304. **Supplementary proceedings.** Interposing delays in supplementary proceedings, with the effect of defeating the creditor's attempt to reach the property, is a contempt of the order.<sup>58</sup> The refusal to apply property, though the defendant deny under oath that he had any, is a contempt.<sup>59</sup> The power to punish for contempt in supplementary proceedings is not affected by the fact that the judgment was merely for costs.<sup>60</sup>

§ 5305. **Undertaking for appearance.** Where a party has been arrested for a contempt, and has given bond, with sureties for his appearance at court, to abide the order of the court, and has been adjudged to be guilty of the misconduct alleged, and punishment by fine and imprisonment ordered, the statute does not authorize the bond to be prosecuted at the same time that a warrant of commitment is issued against the party.<sup>61</sup>

<sup>55</sup> Pitt v. Davison, 37 N. Y. 235.

<sup>56</sup> Id. For proceedings in such cases, see id.

<sup>57</sup> Cal. Code Civ. Pro., § 1212; see *Ex parte Cottrell*, 50 Cal. 420. Before a party can be brought into contempt for not complying with an order of court such order must be served upon him. *Johnson v. Superior Ct.*, 63 Cal. 578; *Hennessy v. Nicol*, 105 id. 138; *Ex parte Rush*, 60 id. 5. The Superior Court loses jurisdiction to punish for a contempt committed in its presence, when it delays to take any proceedings in the matter for a period of fifty days after the alleged commission of the contempt, and then attempts to proceed without notice to the respondent. *In re Foote*, 75 Cal. 543. Service of order on attorney for corporation, *Golden Gate, etc., Co. v. Superior Ct.*, 65 Cal. 187; *Eureka, etc., Canal Co. v. Superior Ct.*, 66 id. 311.

<sup>58</sup> *Ross v. Clussman*, 3 Sandf. 667.

<sup>59</sup> *Matter v. Pester*, 2 Code Rep. 98.

<sup>60</sup> *Brush v. Lee*, 6 Abb. Pr. (N. S.) 50. See, also, as to supplementary proceedings, *Gerrigan v. Wheelwright*, 3 Abb. Pr. (N. S.) 264; *State v. Trounce*, 5 Wash. St. 804.

<sup>61</sup> *Barton v. Butts*, 32 How. Pr. 456.



**§ 5306. Commitment for refusal to testify.**

*Form No. 1185.*

[VENUE.]

The people of the state of California, to A. P., sheriff of the said county, greeting:

E. F., having this day been brought before me, on a warrant by me issued to compel his attendance to testify [where the witness appears in pursuance of the subpoena, say, having this day appeared before me, in pursuance of a subpoena by me issued, requiring him to appear and testify] touching the execution of a conveyance of real estate from K. B. to C. T., to which the said E. F. is a subscribing witness, as is said; and the said E. F., although required by me, having refused to answer upon oath [if the commitment is made on account of the refusal of the witness to answer a particular question deemed pertinent by the officer, insert here, the following question, etc., specifying it particularly] touching the execution of said conveyance. You are, therefore, commanded forthwith to convey the said E. F. to the jail of the said county, and there commit him to close custody in such jail, without bail, until he shall submit to answer on oath as aforesaid [or the question aforesaid] or be discharged according to law.

O. P.,

Judge of ..... County.

[DATE.]

**§ 5307. Disobedience of witness.** Disobedience to a subpoena, or a refusal to be sworn or to answer as a witness, or to subscribe an affidavit or deposition when required, may be punished as a contempt by the court or officer issuing the subpoena or requiring the witness to be sworn; and if the witness be a party, his complaint may be dismissed or his answer stricken out.<sup>62</sup> So the refusal of one party to give to the other party, within a specified time, an inspection and copy, or permission to take a copy of any book, document, or paper in his possession or under his control, containing evidence relating to the merits of the action or defense, may be punished as a con-

<sup>62</sup> Cal. Code Civ. Pro., § 1991; id., § 1209, subd. 10; *Clark v. Reese*, 35 Cal. 89; see, also, *Keisker v. Ayres*, 46 id. 82; compare *Lexinsky v. Superior Ct.*, 72 id. 510; *Clifford v. Allman*, 84 id. 528.

tempt;<sup>63</sup> so of witness not producing books;<sup>64</sup> so of refusal to submit to examination.<sup>65</sup> Witness fined and required to give security, in refusing to answer questions before grand jury, and insolence to them.<sup>66</sup>

§ 5308. **Refusing to testify.** A statement that R. was committed for contempt in refusing to answer certain questions propounded to him by the grand jury is not a compliance with the section. The question asked should be set out.<sup>67</sup> In such a case, the commitment should state that the grand jury were inquiring into a certain question, stating it; that the prisoner was sworn as a witness, and certain questions asked him, stating them; that he refused to answer; that the facts were thereupon presented to the court by the grand jury, and the prisoner required by the court to answer, which being refused by the prisoner, he was committed for contempt. And this rule is based upon the power of an appellate court to review, on *habeas corpus*, the proceedings of an inferior court in cases of contempt.<sup>68</sup> A party committed for refusing to answer questions propounded to him as a witness, under an order that he stand committed till he answer the questions, will be discharged on *habeas corpus*, where it appears that the suit has abated; there being no longer parties or subject-matter before the court, there is no longer a case in which the questions can be asked.<sup>69</sup> It seems that the refractory witness might still be reached by attachment for the contempt, and by a judgment thereon.<sup>70</sup> When witnesses are brought before either branch of the Legis-

<sup>63</sup> Cal. Code Civ. Pro., § 1000.

<sup>64</sup> *Heerdt v. Wetmore*, 2 Robt. 697. An employee of a telegraph company, having charge of messages transmitted by it, is not guilty of contempt for refusing to obey a *subpoena duces tecum* commanding him to search for and produce all messages from and to a large number of persons therein named between specified dates. The subpoena must identify the particular messages required. *Ex parte Jaynes*, 70 Cal. 638. Persons who are subpoenaed to appear before the grand jury as witnesses, and fail to do so, may be punished as for a contempt of court. *Baldwin v. State*, 126 Ind. 24.

<sup>65</sup> *Woods v. De Figanlere*, 1 Robt. 607.

<sup>66</sup> *United States v. Caton*, 1 Cranch C. O. 150.

<sup>67</sup> *Ex parte Rowe*, 7 Cal. 181.

<sup>68</sup> *Id.*

<sup>69</sup> *Ex parte Rowe*, 7 Cal. 175.

<sup>70</sup> *Id.*

lature, they may be compelled to testify by process of contempt, when without legal cause they refuse to do so.<sup>71</sup>

§ 5308a. **Contempts — miscellaneous.** Persons summoned as jurors commit a contempt of court by talking with litigants and forming an opinion upon the merits of their cases.<sup>72</sup> Disobedience of a decree of distribution by an executor or administrator is a contempt of court.<sup>73</sup> So, of the willful refusal of a party to comply with the decree of a court of competent jurisdiction, directing him to execute a conveyance.<sup>74</sup> One who continues to exercise the functions of a public office after being adjudged a usurper thereof, is guilty of a contempt.<sup>75</sup> So, one who obstructs and takes from a police officer, by means of legal process, certain personal property taken by such officer under a search warrant issued by a judge of the Superior Court, is guilty of a contempt.<sup>76</sup> A party can not be held guilty of constructive contempt for refusing to comply with a mere verbal announcement of a direction or order having no existence of record.<sup>77</sup> And the court can not acquire jurisdiction to punish a defendant for contempt by entering a *nunc pro tunc* order modifying the decree at the hearing of an order to show cause why the defendant should not be punished, so as to make the record conform to a prior verbal order not previously entered of record.<sup>78</sup> Where power is conferred by statute upon a

<sup>71</sup> *Ex parte McCarthy*, 29 Cal. 395. The refusal of a witness to be sworn is a contempt, which is not excused by the assertion of the witness as a reason for his refusal that his testimony would have a tendency to subject him to punishment for a felony. This privilege can not be urged until a question is put to him after being sworn, the answer to which would have that tendency. *Ex parte Stice*, 70 Cal. 51. Each refusal to be sworn is a separate contempt, for which the court may impose separate punishments. *Id.* But the refusal of a witness to answer a question not pertinent to the issues on trial is not a contempt, and an order adjudging him guilty of a contempt which fails to show the pertinency of the question is invalid. *Ex parte Zeehandelaar*, 71 Cal. 238; *In re Macknight*, 11 Mont. 126; 28 Am. St. Rep. 451.

<sup>72</sup> *Ruff v. Rader*, 2 Mont. 211.

<sup>73</sup> *Ex parte Cohn*, 55 Cal. 193; *Ex parte Smith*, 53 id. 204.

<sup>74</sup> *Land & Water Co. v. Superior Ct.*, 93 Cal. 139.

<sup>75</sup> *Ex parte Henshaw*, 73 Cal. 486.

<sup>76</sup> *Matter of Lowenthal*, 74 Cal. 109.

<sup>77</sup> *Cosby v. Superior Ct.*, 110 Cal. 45.

<sup>78</sup> *Id.*

police court to punish for contempt, the exercise of the power is restricted to the specific acts defined by law to constitute the offense.<sup>79</sup>

§ 5308b. **The same — discharge.** After an order of a court on *habeas corpus* discharging a person under sentence of imprisonment for contempt of another court, he can not be again imprisoned for the same contempt.<sup>80</sup>

§ 5308c. **The same — prior punishment for contempt.** The court is not deprived of authority to punish for contempt by reason of a prior imprisonment for contempt in a matter distinct from that for which the subsequent order was made, where it appears that the contempt first punished was committed prior to the first imprisonment, and that the offense subsequently punished is the violation of a subsequent order which could not have been made the basis of the prior contempt.<sup>81</sup>

<sup>79</sup> *In re Shannon*, 11 Mont. 67.

<sup>80</sup> *Grady v. Superior Ct.*, 64 Cal. 155.

<sup>81</sup> *Ex parte Clark*, 110 Cal. 405.

## CHAPTER VI.

### DEPOSIT IN COURT AND APPOINTMENT OF RECEIVER.

**§ 5309. Deposit in general.** Deposit in court may be made in the following cases, under the Code: 1. In arrest and bail, the defendant at any time before execution shall be discharged from arrest upon depositing the amount mentioned in the order of arrest,<sup>1</sup> or he may at the time of the arrest deposit the amount in the hands of the sheriff; or, if the bail be reduced, may deposit the reduced amount instead of giving bail, and shall receive from the sheriff a certificate of the deposit made, and he shall be discharged from custody.<sup>2</sup> The sheriff shall then deposit the money in court, giving a certificate to each of the parties.<sup>3</sup> Deposit in court may be made: 2. In actions for the foreclosure of mortgages, after the sale of the property, if there be surplus money after payment of the amount due on the mortgage, lien, or incumbrance, with costs, the court may cause the same to be paid to the persons entitled to it, and in the meantime may direct it to be deposited in court.<sup>4</sup> Deposit in court may be made: 3. In actions against steamers, boats, and vessels, after the satisfaction of the execution by the application of the process of sale: 1. To the payment of the amount of claims filed; and 2. To the payment of the judgment and costs and sheriff's fees; if no appearance by the owner, master, or consignee has been made in the action, the court shall direct a deposit of the balance in court.<sup>5</sup> Deposit in court may be made: 4. In appeal, to render the appeal effectual for any purpose, appellant shall file an undertaking in the amount required by law, or such amount may be deposited in court in lieu thereof.<sup>6</sup> Deposit in court may be made: 5. A defendant,

<sup>1</sup> Cal. Code Civ. Pro., § 486.

<sup>2</sup> Id., § 497.

<sup>3</sup> Id., § 498. As to disposition of money on recovery of judgment, see Id., § 500.

<sup>4</sup> Id., § 727.

<sup>5</sup> Id., § 825.

<sup>6</sup> Id., § 941; and such deposit will be effectual as a stay of pro-

against whom an action is pending upon a contract or for specific personal property, at any time before answer, upon affidavit that a person, not a party to the action, makes against him, and without any collusion with him, a demand upon the same contract, or for the same property, upon notice to such person and the adverse party, may apply to the court to substitute such third person in his place and discharge him from liability to either party, on his depositing in court the amount claimed on such contract, or delivering the property or its value to such person as the court may direct, and the court may in its discretion make an order substituting a person in the place of the defendant, on the latter depositing in the court the amount claimed on the contract.<sup>7</sup> So a tenant may offer to pay the rents into court to abide the ultimate decision of the case.<sup>8</sup> There are many cases occurring in practice where the court, in the exercise of its equity powers, may order the fund which is the subject of the litigation to be paid into court to abide the result of the suit, as well as special sums for purposes incident to the action.

**§ 5310. Appointment of receiver.** A receiver may be appointed by the court in which an action is pending, or by the judge thereof, in the following cases: 1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiffs or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured; 2. In an action by a mortgagee for a foreclosure of his mortgage and sale of the mortgaged property, where it appears there is danger of the mortgaged property being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt; 3. After judgment to carry the judgment into effect; 4. After judgment  
ceedings in the court below upon the judgment or order appealed from, except in the cases provided for in sections 942, 943, 944, and 945; *Id.*, § 949; see § 5011, *ante*.

<sup>7</sup> Cal. Code Civ. Pro., § 386.

<sup>8</sup> *McDevitt v. Sullivan*, 8 Cal. 592.

to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment; 5. In the case when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; 6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity.<sup>9</sup> Upon the dissolution of a corporation the District Court of the county may, upon the application of any creditor, stockholder, or member of the corporation, appoint one or more persons to be trustees or receivers, to take charge of the estate and effects thereof for the purposes named in the statute.<sup>10</sup>

<sup>9</sup> Cal. Code Civ. Pro., § 564. Appointment of receiver of mortgaged property. See *Toby v. Railroad Co.*, 98 Cal. 495. Who may not be appointed receiver. Cal. Code Civ. Pro., § 566, amendment of 1897. Grounds for objection to appointment of receiver. Cal. Code Civ. Pro., § 641, amendment of 1897.

<sup>10</sup> See *Id.*, § 565. In the absence of statutory authority, a receiver can not be appointed during the pendency of an action to displace the management of a corporation by its directors. *Fischer v. Superior Ct.*, 110 Cal. 129; compare *State v. District Ct.*, 15 Mont. 324. In the case of *La Societe Francaise d'Epargnes et de Prevoyance Mutuelle v. The Fifteenth District Court, etc.*, 53 Cal. 495, decided December, 1878, by the Supreme Court of California, it was held that the general and ordinary jurisdiction of courts of equity does not embrace the power to appoint a receiver of the property of a corporation in aid of a suit prosecuted against it by a private person, but such power, if it exists at all, must be derived from a statute conferring it upon the court, and that section 564 of the Code of Civil Procedure does not confer it. It was further held that the effect of the appointment of a receiver in such case is to dissolve the corporation. See, also, *Neall v. Hill*, 16 Cal. 145; 76 Am. Dec. 508; and *Attorney-General v. Utica Ins. Co.*, 2 Johns. Ch. 388, cited in the above case. For notes and authorities upon the subject of receivers generally, see *ante*, §§ 581-604.

## CHAPTER VII.

### PROCEEDINGS ON OFFER TO COMPROMISE.

§ 5311. **In general.** The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, or to the effect therein specified. If the plaintiff accept the offer, and give notice thereof within five days, he may file the offer with proof of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and can not be given in evidence upon the trial; and if the plaintiff fail to obtain a more favorable judgment, he can not recover costs, but must pay the defendants costs from the time of the offer.<sup>1</sup> An offer under the foregoing section is not to be deemed an admission that anything is due, unless the offer in the terms in which it is made is accepted, in which case judgment is entered.<sup>2</sup> The distinction between an "offer to compromise" and a *cognovit* at common law should be kept in mind; the latter being good as an admission *in pais* after answer filed.<sup>3</sup> If judgment is entered upon the *cognovit*, and by its authority, then the amount acknowledged would have been the sum of the judgment; but where upon complaint and answer denying the allegations thereof, the acknowledgment is used as evidence, interest may be given by way of damages.<sup>4</sup> The "offer to compromise" and a *cognovit* depend for their effect upon actions already brought, and are, therefore, to be distinguished from a warrant of attorney to confess judgment, which is given before action brought, and the offer in writing under section 2074 of the California Code of Civil Procedure, which may be made either before or after action brought. The true meaning of the statute authorizing the clerk to enter judgment upon an offer on

<sup>1</sup> Cal. Code Civ. Pro., § 997; see, also, Id., § 895; § 3245, *ante*.

<sup>2</sup> See Id., § 2078.

<sup>3</sup> Hirschfield v. Franklin, 6 Cal. 607.

<sup>4</sup> Id.; see Campbell v. Goddard, 117 Ill. 251.



the part of defendant to suffer judgment for a specified sum, etc., is that he can enter judgment only when the offer is made after action is brought by the filing of the complaint and while pending, and where the party hands to the clerk the complaint, offer of judgment, and notice of acceptance of the offer, at the same time, and thereupon the clerk enters judgment, it is void.<sup>5</sup> If the defendant at any time before the trial offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial, and fail to recover in the action a sum equal to the offer, he shall not recover costs, but costs shall be adjudged against him, and if he recover, be deducted from his recovery. But the offer and failure to accept it shall not be given in evidence to affect the recovery otherwise than as to costs.<sup>6</sup> An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property.<sup>7</sup>

<sup>5</sup> *Crane v. Hirschfelder*, 17 Cal. 582.

<sup>6</sup> Cal. Code Civ. Pro., § 895.

<sup>7</sup> *Id.*, § 2074.

## CHAPTER VIII.

### INSPECTION OF BOOKS, DOCUMENTS, ETC., AND PROOF OF WRITINGS, RECORDS, AND STATUTES.

§ 5312. **In general.** The Code provides that any court in which an action is pending, or a judge thereof, or a county judge, may, upon notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy of entries of accounts in any book or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. If compliance with the order be refused, the court may exclude the entries of accounts of the book or the document or paper, from being given in evidence; or if wanted as evidence by the party applying, may direct the jury to presume them to be such as he alleges them to be; and the court may also punish the party refusing for a contempt. This section is not to be construed to prevent a party from compelling another to produce books, papers, or documents when he is examined as a witness.<sup>1</sup> The Code does not prescribe upon what evidence the order shall be based, whether upon affidavit or oral testimony. The better practice is to base the motion upon affidavits showing that the books, papers, or documents are in the possession of the adverse party, or under his control, and their materiality as evidence, and to serve a copy of the same with the notice. When the order is obtained, a copy of it must also be served, not only for the purpose of laying a foundation for proceedings for contempt, but to notify him what particular books, papers, and documents are required to be inspected and copied. Where an inspection or copy is not desired in advance of the trial, notice may be given the adverse party to produce it; and if he fail to do so, the writing may then be proved by the party giving the notice, as in case of its loss. But the notice to produce it is not necessary where the writing is itself a notice, or where it has been wrongfully obtained or withheld by the adverse party.<sup>2</sup>

<sup>1</sup> Cal. Code Civ. Pro., § 1000; see, also, Id., § 1855, subd. 2.

<sup>2</sup> Id., § 1938. New York procedure to procure inspection of books or papers. See *Amsinck v. North*, 62 How. Pr. 115; *Iron Co. v. Improvement Co.*, 55 Id. 351.

§ 5313. Notice of motion for order of inspection, etc., of books, documents, etc.

*Form No. 1186.*

[TITLE.]

To C. D., defendant in said action:

Sir. You are hereby notified that the plaintiff herein will, on the ..... day of ....., 18.., at ten o'clock, A. M., or as soon thereafter as counsel can be heard, at the courtroom of said court, in the city hall at ....., in said county, move the court for an order that you give to this plaintiff an inspection and copy of [describe book, document, or paper], in your possession [or under your control], containing evidence relating to the merits of this action. Said motion will be based and heard upon the affidavit of ....., a copy of which is hereto attached and herewith served, and the files and records of said court in said cause.

E. F.,  
Attorney for Plaintiff.

§ 5314. Notice to produce papers, etc., on trial.

*Form No. 1187.*

[TITLE.]

To ....., defendant [or plaintiff]:

You are hereby notified to produce upon the trial of the above-entitled cause [a certain contract in writing made between A. B. and C. D., on or about the ..... day of ....., 18.., relating to the sale of the premises described in the complaint herein], and if you fail to do so secondary evidence of its contents will be given.

E. F.,  
Attorney for Defendant.

§ 5315. Affidavit to prove loss. In California the testimony may be given orally or offered by affidavit. Either course may be adopted, and either course will avail.<sup>3</sup> So proof of loss of an instrument may be by the party's own affidavit, to lay a foundation for proving the contents. But the affidavit of a third person, that a trunk of the party containing his papers is lost, is insufficient, without showing that it contained the paper in question. But this the party may show by his own oath.<sup>4</sup> An

<sup>3</sup> Bagley v. Eaton, 10 Cal. 126.

<sup>4</sup> McCann v. Beach, 2 Cal. 25; see Alvord v. Spring Valley Gold Co., 106 id. 547.

affidavit showing that the surveyor-general has adopted a rule refusing to allow the original to be taken from the files is a sufficient predicate.<sup>5</sup>

**§ 5316. Altered writing.** The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, and such alteration is not noted on the writing, shall account for the appearance or alteration. The party may show that the alteration was made by another, without his concurrence, or was made with the consent of the parties affected by it, or otherwise properly or innocently made. If he do that, he may give the writing in evidence, but not otherwise.<sup>6</sup> Where a deed is produced, it is incumbent on the party to establish by satisfactory evidence that the alteration was made by the grantor or by his authority, or the deed will be deemed, for the purposes of the action, to read as it did before the alteration was made.<sup>7</sup> A party offering a promissory note in evidence is not obliged, before the same is admitted, to account for an erasure appearing upon the face of it, unless the erasure has been made, or appears to have been made, after the execution of the instrument, and is on a part of the note which is material to the point in dispute.<sup>8</sup> So, on a printed form of note, where the erasure is made only as to the printed matter.<sup>9</sup>

**§ 5317. Copies of records as evidence.** Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise expressly provided by statute.<sup>10</sup> "Public writings" are laws, judicial records, other official documents, and public records, kept in this state, of private writings.<sup>11</sup> Every public officer having the custody of a public writing which a citizen has a right to inspect is bound to give him, on demand, a certified copy of it, on payment of legal fees therefor, and such copy is admissible in evidence in like cases and with like effect as the original writing.<sup>12</sup> A public record of

<sup>5</sup> Hensley v. Tarpey, 7 Cal. 288.

<sup>6</sup> Cal. Code Civ. Pro., § 1862.

<sup>7</sup> Galland v. Jackman, 26 Cal. 79; 85 Am. Dec. 172.

<sup>8</sup> Corcoran v. Doll, 32 Cal. 82.

<sup>9</sup> Id.; see, also, Brooks v. Calderwood, 34 Cal. 564; Wunderlin v. Cadogan, 50 id. 613.

<sup>10</sup> Cal. Code Civ. Pro., § 1892.

<sup>11</sup> Id., § 1894.

<sup>12</sup> Id., § 1893.

a private writing may be proved by the original record, or by a copy thereof certified by the legal keeper of the record.<sup>13</sup> There is no attempt by the statute to dispense with the rule that the best evidence must be resorted to which the nature of the case will admit.<sup>14</sup> To entitle a book to the character of an official register, it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable. It is sufficient that it is directed by the proper officer to be kept.<sup>15</sup> It is well settled that a certified copy of an instrument affecting real property, duly recorded, may be read in evidence, without proof of the original, if it be shown to the satisfaction of the court that the original is not under the control of the party.<sup>16</sup> Alcaldes' records are on a footing with other records kept by the county recorder, and a certified copy of an instrument found therein is admissible under the same circumstances as are certified copies of records made by himself, upon proof of the loss of or inability of the party to produce the original.<sup>17</sup> A sworn copy of exemplification of instruments in the archives of the government is evidence, and the originals ought not to be removed from the government offices.<sup>18</sup>

**§ 5318. Foreign state records and laws.** A copy of the written law or other public writing of any state or country, attested by the certificate of the officer having charge of the original, under the public seal of the state or country, is admissible as evidence of such law or writing.<sup>19</sup> The oral testimony of wit-

<sup>13</sup> Id., § 1919.

<sup>14</sup> *Macy v. Goodwin*, 6 Cal. 579.

<sup>15</sup> *Kyburg v. Perkins*, 6 Cal. 674.

<sup>16</sup> Cal. Code Civ. Pro., § 1951; *Hicks v. Coleman*, 25 Cal. 122; 85 Am. Dec. 103; *Hurlbutt v. Butenop*, 27 id. 50; *McMinn v. O'Connor*, id. 238; cited in *Mayo v. Mazeaux*, 38 id. 442.

<sup>17</sup> *Kyburg v. Perkins*, 6 Cal. 674; *Donner v. Palmer*, 31 id. 500; *Sill v. Reese*, 47 id. 294; *Garwood v. Hastings*, 38 id. 216; citing *Touchard v. Keyes*, 21 id. 210.

<sup>18</sup> *Gregory v. McPherson*, 13 Cal. 574. Copy of decree of land commission as evidence. See *Young v. Emerson*, 18 Cal. 416. It is not necessary to prove the loss of an original patent before an exemplified copy thereof can be produced in evidence. *Eltzroth v. Ryan*, 89 Cal. 135.

<sup>19</sup> Cal. Code Civ. Pro., § 1901; see *Wickersham v. Johnston*, 104 Cal. 407; 43 Am. St. Rep. 118. As to statute books of other states published by authority, see Cal. Code Civ. Pro., § 1900.

nesses skilled therein is admissible as evidence of the unwritten law of a sister state or foreign country, as are also printed and published books of reports of the decisions of the courts of such state or country, or proved to be commonly admitted in such courts.<sup>20</sup>

§ 5319. **Foreign record.** A judicial record of a foreign country may be proved by the production of a copy thereof, certified by the clerk, with the seal of the court annexed, if there be a clerk and seal, or by the legal keeper of the record, with the seal of his office annexed, if there be a seal, to be a true copy of such record, together with a certificate of the chief judge or presiding magistrate that the person making the certificate is the clerk of the court, or the legal keeper of the record, and in either case, that the signature is genuine, and the certificate in due form; and the signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister or ambassador of the United States, or of a consul, vice-consul, or consular agent of the United States, in such foreign country.<sup>21</sup> Such certificates are generally received as *prima facie* evidence of both the character of the officers giving them and the genuineness of their signatures.<sup>22</sup> So of a certificate of a notary public or United States consul;<sup>23</sup> or notaries and consuls of every grade, whether principal or inferior notary, or consul-general, or vice-consul.<sup>24</sup> A copy of the judicial record of a foreign country is also admissible in evidence upon proof: 1. That the copy offered has been compared by the witness with the original, and is an exact transcript of the whole of it; 2. That such original was in the custody of the clerk of the court or other legal keeper of the same; and 3. That the copy is duly attested by a seal, which is proved to be the seal of the court where the record remains, if it be the record of a

<sup>20</sup> Id., § 1902; see § 4616, *ante*. Where a particular section of the laws of a foreign state is read as evidence, from a printed volume of the statutes of that state, the court, for the purpose of determining what is the law of that state, is not confined to the particular section, but may examine the entire volume. *Ex parte Spears*, '88 Cal. 640.

<sup>21</sup> Cal. Code Civ. Pro., § 1906.

<sup>22</sup> *Mott v. Smith*, 16 Cal. 533.

<sup>23</sup> Id.

<sup>24</sup> Id.; see *Ely v. Frisbie*, 17 Cal. 250.

court; or if there be no such seal, or if it be not a record of a court, by the signature of the legal keeper of the original.<sup>25</sup>

**§ 5320. Judicial records.** A judicial record of this state or of the United States may be proved by the production of the original or a copy thereof, certified by the clerk, or other person having the legal custody thereof. That of a sister state may be proved by the attestation of the clerk and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form.<sup>26</sup>

**§ 5321. Printed statutes.** Books printed or published under the authority of a sister state or foreign country, and purporting to contain the statutes, Code, or other written law of such state or country, or proved to be commonly admitted in the tribunals of such state or country as evidence of the written law thereof, are admissible in this state as evidence of such law.<sup>27</sup>

**§ 5322. Seal, impression of.** A seal of a court or public office may be impressed upon wax, wafer, or any other substance, and then attached to the original or a copy thereof, or it may be impressed on the paper alone.<sup>28</sup> A scrawl, with "L. S." written within, is sufficient as a private seal.<sup>29</sup>

**§ 5323. Secondary evidence — lost papers.** There shall be no evidence of the contents of a writing other than the writing itself, except: 1. When the original has been lost or destroyed; in which case proof of the loss or destruction shall first be made.<sup>30</sup> Diligent search in all places where the original is likely to be found must be shown, unless it is proved to have been destroyed.<sup>31</sup> The facts and circumstances of the destruction must

<sup>25</sup> Cal. Code Civ. Pro., § 1907; see *Young v. Rosenbaum*, 39 Cal. 654; *Wickersham v. Johnston*, 104 id. 407; 43 Am. St. Rep. 118.

<sup>26</sup> Id., § 1905; see, also, Const. U. S., art. 4, § 1; *Thompson v. Manrow*, 1 Cal. 428; *Parke v. Williams*, 7 id. 249; *Low v. Burrows*, 12 id. 181; *Ritchie v. Carpenter*, 2 Wash. St. 512; 26 Am. St. Rep. 877.

<sup>27</sup> Id., § 1900

<sup>28</sup> Id., § 1931; *Connolly v. Goodwin*, 5 Cal. 220.

<sup>29</sup> Id., § 1931. See, as to certified copy of deed, *Jones v. Martin*, 16 Cal. 166; *Anthony v. Chapman*, 65 id. 73; see, also, *Donner v. Palmer*, 31 id. 500, and cases there cited.

<sup>30</sup> Id., § 1855, subd. 1.

<sup>31</sup> *Taylor v. Clark*, 49 Cal. 671; *People v. Hust*, id. 653; *Alvord v. Spring Valley Gold Co.*, 106 Cal. 547; *Gillen v. Henkel*, 9 Col. 394.

be shown.<sup>32</sup> So in suit by the assignee of a book-account, the assignor is a competent witness to prove to the court the loss of the book of original entries, as a preliminary to the introduction of secondary evidence of its contents.<sup>33</sup> So where the record-book containing a judgment has been destroyed by fire, secondary evidence is admissible to establish the fact of the existence of such judgment and its contents.<sup>34</sup> Proof that a notice upon a mining claim has been torn, and that the remaining portion is, as the witness thinks, illegible and defaced, is enough to introduce a copy of it.<sup>35</sup> But a copy of a notice posted on a mining claim, to show its extent, is not admissible in evidence, if the notice itself be attainable.<sup>36</sup> The proof of the loss of receipts, without proof of their genuineness, is not a sufficient predicate for the admission of evidence as to their contents.<sup>37</sup> The plaintiff's oath that he had never had the deed was held to be insufficient to introduce parol proof of its contents.<sup>38</sup> Where an original instrument, proved to be lost, has been recorded, it is error to admit parol evidence of its contents, unless the failure to produce the record is accounted for.<sup>39</sup> To make the copy of an unrecorded deed evidence, the loss of the original being shown, the testimony of the subscribing witnesses to the deed, if such there be, should be had, at least to the fact of the execution of the paper unless they are shown to be without the jurisdiction of the court.<sup>40</sup>

**§ 5324. Secondary evidence — possession of adverse party.** There shall be no evidence of the contents of a writing other than the writing itself, except: 2. Where the original is in pos-

<sup>32</sup> Bagley v. Adm'r of McMickle, 9 Cal. 430.

<sup>33</sup> Caulfield v. Sanders, 17 Cal. 569. As to parol evidence to prove contents of instruments destroyed by fire, see Collier v. Corbett, 15 Cal. 183.

<sup>34</sup> Ames v. Hoy, 12 Cal. 11.

<sup>35</sup> Dunning v. Rankin, 19 Cal. 640.

<sup>36</sup> Lombardo v. Ferguson, 15 Cal. 372.

<sup>37</sup> Reynolds v. Jourdan, 6 Cal. 108.

<sup>38</sup> Lawrence v. Fulton, 19 Cal. 684.

<sup>39</sup> Brotherton v. Mart, 6 Cal. 488.

<sup>40</sup> Smith v. Brannan, 13 Cal. 107. A copy of a certified copy of an original instrument which has been lost is not admissible in evidence to prove the contents of the original. Dyer v. Hudson, 65 Cal. 372. And a witness who can not read or write is incompetent to testify to the contents of a lost instrument. Russell v. Brosseau, 65 Cal. 605.



session of the party against whom the evidence is offered, and he fails to produce it after reasonable notice.<sup>41</sup> Where it is impossible to produce the paper between the time of giving the notice and the trial, that fact should be made to appear.<sup>42</sup> Parol evidence of the contents of a written contract between the alleged husband and wife to live together without marriage is inadmissible, except after due notice to produce the contract, and refusal to do so.<sup>43</sup> Parol proof of a written contract and assignment thereof in writing, not admissible, so as to charge the assignee without notice to produce the original or account for its loss.<sup>44</sup>

• **§ 5325. Secondary evidence—records and public documents.** There shall be no evidence of the contents of a writing other than the writing itself, except: 3. When the original is a record, or other document, in the custody of a public officer.<sup>45</sup> Certified copies of grants made by the surveyor-general of the United States are inadmissible in evidence unless the absence of the original is accounted for.<sup>46</sup> The *expediente*, consisting of the petition, plot, reference, report, act of concession, approval, grant, etc., filed in the archives of the Mexican government, is as much an original document as the grant delivered to the grantee.<sup>47</sup> Where, to suit for goods sold and delivered, defendant pleads his discharge in insolvency, it was held that in support of his plea he can offer in evidence certified copies of the decree, and of each of the papers composing the record of the insolvent proceedings, separately; and that these papers need not all be attached together, and the whole certified as one record.<sup>48</sup>

**§ 5326. Secondary evidence—made by statute.** There shall be no evidence of the contents of a writing other than the writing itself, except: 4. When the original has been recorded, and a certified copy of the record is made evidence by this Code

<sup>41</sup> Cal. Code Civ. Pro., § 1855, subd. 2.

<sup>42</sup> *Burke v. Table Mountain Co.*, 12 Cal. 403.

<sup>43</sup> *Poole v. Gerrard*, 9 Cal. 593.

<sup>44</sup> *Grimes v. Fall*, 15 Cal. 63; see *Jones v. Jones*, 38 id. 586.

<sup>45</sup> Cal. Code Civ. Pro., § 1855, subd. 3.

<sup>46</sup> *Hensley v. Tarpey*, 7 Cal. 288; but see *Natoma Water & Mining Co. v. Clarkin*, 14 id. 544; see *Brown v. Griffith*, 70 id. 14; *Grant v. Oliver*, 91 id. 158.

<sup>47</sup> *Gregory v. McPherson*, 13 Cal. 562.

<sup>48</sup> *Goldstone v. Davidson*, 18 Cal. 41.

or other statute.<sup>49</sup> But it does not dispense with the production of the originals, if they can be obtained; it merely fixes the value of the copy as evidence, when it is necessary to be introduced, from the loss of the original.<sup>50</sup> A recorder need not transcribe the notarial seal to the acknowledgment of a deed where the certificate states that the seal was affixed.<sup>51</sup> A power of attorney, not affecting real estate, is not required to be recorded, and the fact that it acknowledges land recorded does not dispense with proof of its execution.<sup>52</sup> A party claiming title under a deed duly acknowledged is entitled to have a certified copy of the record of the same received in evidence, upon making statute proof that he never had control of the original, and that it is not in his power or control;<sup>53</sup> or that they are lost.<sup>54</sup> A United States patent for land may be proved by producing from the recorder's office the book in which it is recorded, without proof of the loss of the original.<sup>55</sup>

**§ 5327. Secondary evidence—numerous accounts.** There shall be no evidence of the contents of a writing other than the writing itself, except: 5. When the original consists of numerous accounts or other documents, which can not be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.<sup>56</sup> The fact of the making of the writing may be proved by parol.<sup>57</sup> The acts of a corporation by its board of directors may be proved by parol, where by mistake they were not entered on the minutes.<sup>58</sup>

<sup>49</sup> Cal. Code Civ. Pro., § 1855, subd. 4; *McMinn v. O'Connor*, 27 Cal. 238. The act of 1851, section 21, gives to papers properly recorded the like effect as originals, but it does not dispense with proof of execution. *Powell's Heirs v. Hendricks*, 3 Cal. 427. But this statute is changed. See Cal. Code Civ. Pro., § 1951.

<sup>50</sup> *Mace v. Goodwin*, 6 Cal. 579; *McMinn v. O'Connor*, 27 id. 238.

<sup>51</sup> *Jones v. Martin*, 16 Cal. 165.

<sup>52</sup> *Stevens v. Irwin*, 12 Cal. 306.

<sup>53</sup> *Hurlbutt v. Butenop*, 27 Cal. 50.

<sup>54</sup> *Hicks v. Coleman*, 25 Cal. 129; 85 Am. Dec. 103.

<sup>55</sup> *Vance v. Kohlberg*, 50 Cal. 346; *Eltzroth v. Ryan*, 89 id. 135.

<sup>56</sup> Cal. Code Civ. Pro., § 1855, subd. 5. In cases mentioned in subdivisions 3 and 4, a copy of the original, or of the record, must be produced; in those mentioned in subdivisions 1 and 2, either a copy or oral evidence of the contents. *Id.* This section is limited to proof of the contents of the writing.

<sup>57</sup> *Poole v. Gerrard*, 9 Cal. 594; *Sals v. Sals*, 49 id. 264.

<sup>58</sup> *Bay View Homestead Ass'n v. Williams*, 50 Cal. 353.

## CHAPTER IX.

### SUBMITTING CONTROVERSY WITHOUT ACTION.

§ 5328. **In general.** Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought; but it must appear, by affidavit, that the controversy is real, and the proceedings in good faith, to determine the rights of the parties.<sup>1</sup> Judgment shall be entered in the judgment-book as in other cases, but without costs for any proceeding prior to the trial. The case, the submission, and a copy of the judgment shall constitute the judgment-roll,<sup>2</sup> and may be enforced in the same manner as if it had been rendered in an action, and is in the same manner subject to appeal.<sup>3</sup> Where an appeal is taken from a decision of the Justice's Court in such a case, the transcript on appeal must contain a copy of the affidavit required by the same section, showing the reality of the controversy and good faith of the proceeding.<sup>4</sup> Where instead of this affidavit the record only showed an allegation in the agreed statement on appeal that the cause was heard in the court below on an agreed statement of facts, and the affidavit of the defendant that the controversy was real, the appeal was dismissed.<sup>5</sup> Where the parties to a controversy make an agreed case, under section 377 of the California Practice Act,<sup>6</sup> which

<sup>1</sup> Cal. Code Civ. Pro., § 1138. Parties can not, by agreeing upon a statement of facts, invoke the aid of a court for the decision of what, to them, or either of them, is merely a moot question of law. *Johnson v. Malloy*, 74 Cal. 430. The agreed case must show a question in difference between the parties which might be the subject of a civil action. *White v. Clarke*, 111 Cal. 425.

<sup>2</sup> Id., § 1139; *Hartman v. Smith*, 7 Mont. 19; see *Sweet v. Myers*, 3 S. Dak. 324.

<sup>3</sup> Id., § 1140. Where the judgment recites that the cause was decided upon an agreed statement of all the facts, such agreed statement may be considered upon appeal, whether it constitutes a part of the judgment-roll or not. *Gregory v. Gregory*, 102 Cal. 50.

<sup>4</sup> *Mellois v. Chalne*, 20 Cal. 679.

<sup>5</sup> Id.; see, also, *White v. Clarke*, 111 Cal. 425.

<sup>6</sup> Cal. Code Civ. Pro., § 1138.

was submitted for decision to the District Court the consideration of the court is restricted to the facts submitted in the case.<sup>7</sup> Where the plaintiff claimed that the defendant was indebted to him, and under the section above referred to a case was made and submitted stating the facts agreed upon between the parties, upon which the District Court decided that plaintiff's demand was not established without proof of other additional facts, it was held that it was error for the court, instead of rendering judgment for the defendant, to make an order based upon the supposition that plaintiff established such other facts.<sup>8</sup>

**§ 5329. Submission of controversy without action.**

*Form No. 1188.*

[TITLE SAME AS IN PLEADING.]

The said parties hereby agree upon the following statement of facts, and submit the same to the court for the determination of the points in controversy hereinafter specified. The facts agreed on are as follows [set forth facts as agreed].

The points in controversy, and upon which the decision of the court is asked, are as follows [state points in controversy].

[DATE.]

[SIGNATURES.]

**§ 5330. Affidavit to submission.**

*Form No. 1189.*

[VENUE.]

A. B. and C. D., the parties to the foregoing case, being duly severally sworn, each for himself says that the controversy set forth in the foregoing submission is real, and the proceedings in good faith to determine the rights of the said parties.<sup>9</sup>

[JURAT.]

[SIGNATURES.]

<sup>7</sup> *Crandall v. Amador County*, 20 Cal. 72. And the judgment of the court can not be based upon any other facts which it may suppose one of the parties can establish. *Green v. Fresno County*, 95 Cal. 329.

<sup>8</sup> *Crandall v. Amador County*, 20 Cal. 72. No findings are necessary or required where an agreed statement covers all the facts in the case. *Gregory v. Gregory*, 102 Cal. 50; *Muller v. Rowell*, 110 id. 318.

<sup>9</sup> An affidavit which, instead of showing that the controversy is real, states that "the statement of the case" is "a real controversy," and, instead of stating that the proceedings are in good faith, states that the "contention" is in good faith, is insufficient to authorize the court to entertain the submission. *White v. Clarke*, 111 Cal. 425; see *Grant v. Newsom*, 81 N. O. 36; *Glessman v. Crozier*, 80 Ind. 487; *Myers v. Lawyer*, 99 id. 237.

## CHAPTER X.

### TAKING DEPOSITIONS.

**§ 5331. When may be taken.** The testimony of a witness in California may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant; and in a special proceeding, after a question of fact has arisen therein, in the following cases: 1. Where the witness is a party to the action or proceeding, or an officer or member of a corporation which is a party to the action or proceeding, or a person for whose immediate benefit the action or proceeding is prosecuted or defended; 2. Where the witness resides out of the county in which his testimony is to be used; 3. Where the witness is about to leave the county where the action is to be tried, and will probably continue absent when the testimony is required; 4. Where the witness, otherwise liable to attend the trial, is nevertheless too infirm to attend; 5. Where the testimony is required upon a motion, or any other case where the oral examination of the witness is not required.<sup>1</sup>

**§ 5332. Before whom taken.** Depositions in this state may be taken before any judge or officer authorized to administer oaths.<sup>2</sup> An affidavit taken in another state of the United States to be used in this state may be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, or before any notary public, or before a judge or clerk of a court of record having a seal.<sup>3</sup> Any affidavit taken in a foreign country to be used in this state may be taken before an ambassador, minister, consul, vice-consul, or consul or agent of the United States, or before any judge of a court of record having a seal, in such foreign country.<sup>4</sup>

<sup>1</sup> Cal. Code Civ. Pro., § 2021. Under Oregon Code, see *Roberts v. Parrish*, 17 Oreg. 583. It is within the discretion of the trial court to permit or refuse the taking of the deposition of a witness during the progress of a trial. *Willard v. Mellor*, 19 Col. 534.

<sup>2</sup> Id., § 2031.

<sup>3</sup> Id., § 2013.

<sup>4</sup> Id., § 2014; and see Id., § 2024, amendment of 1891.

§ 5333. **Competency of witness.** To make the testimony of a witness admissible, he must be competent at the time of taking deposition. It is the effect of the interest on the witness at the time his testimony is taken that disqualifies him.<sup>5</sup> Where the parties stipulated that a deposition which had been taken in another action should be used on the trial, "with the same force and effect, subject to the same exceptions, as if taken in this case," and the party objecting had attended at the examination in such former case without objecting to the competency of the witness, it was held that the stipulation was a waiver of any objections to the competency of the witness.<sup>6</sup>

§ 5334. **How taken.** Where a deposition of a party to the suit is taken *ex parte*, though after notice, and the witness is, therefore, not subjected to a cross-examination, the language used by him will be suspiciously regarded, and only a very literal interpretation given to it.<sup>7</sup> A party who appears at the taking of a deposition and examines the witness, without objecting to his competency, can not afterwards interpose that objection.<sup>8</sup> The deposition of a party to a civil action may be taken, notwithstanding he is confined in jail.<sup>9</sup>

§ 5335. **When admissible.** Depositions, if properly taken, may be used by either party upon the trial, against any party giving or receiving the notice, subject to all legal exceptions; but if the parties attend at the examination, no objection to the form of an interrogatory shall be made at the trial unless the same was stated at the time of the examination.<sup>10</sup> The only

<sup>5</sup> Kimball v. Gearhart, 12 Cal. 27. The death of a party to an action and the substitution of his legal representative, subsequent to the commencement of suit against him, will not render inadmissible in evidence the deposition of an adverse party in interest, when, at the time such deposition was taken, the testimony of the witness was competent. Neis v. Farquharson, 9 Wash. St. 508.

<sup>6</sup> Brooks v. Crosby, 22 Cal. 42. A deposition taken under a stipulation which provides for the admission of the deposition without conditions is governed by the stipulation, and not by the statutory provisions. People v. Grundell, 75 Cal. 301.

<sup>7</sup> Spring v. Hill, 6 Cal. 17; see Cal. Code Civ. Pro., § 2033.

<sup>8</sup> Brooks v. Crosby, 22 Cal. 42.

<sup>9</sup> Maxwell v. Rives, 11 Nev. 213. As to how depositions must be taken when taken out of the state, see Cal. Code Civ. Pro., §§ 2024-2028; when taken within the state, see *Id.*, §§ 2031-2038. Stipulation of parties as to taking deposition of witness out of state. See Palmer v. Mining Co., 70 Cal. 614.

<sup>10</sup> If the deposition be taken under subdivisions 2, 3 or 4 of section 2021, proof must be made at the trial that the witness con-

legal exception which is waived if not made at the taking, where the party attends, is as to the form of the interrogatory.<sup>11</sup> But objection must be made when the deposition is offered in evidence.<sup>12</sup> A deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by the defendants on a new trial.<sup>13</sup> The deposition of a surveyor who ran the boundary line of a grant, taken in one action, is admissible in another action between different parties, as hearsay evidence upon the location of such lines, after his death. Hence, the deposition of Vioget as to the position of the southern boundary of the Sutter grant, offered in connection with the map drawn by him, is admissible as hearsay evidence, though taken in another action between different parties.<sup>14</sup>

§ 5335a. *The same — continued.* The party upon whose application depositions have been taken is not bound to offer them in evidence at the trial, but may resort to other evidence. And his failure to use the depositions is not a ground of surprise, for which a new trial should be granted.<sup>15</sup> If a party has been offered as a witness in his own behalf, and fully examined, and is present in court, it is wholly in the discretion of the court to refuse to allow his counsel to read his deposition taken before the trial.<sup>16</sup> A deposition which is taken in an action between two parties, and is admissible in such action, is admissible in an action between their successors in interest upon the same sub-

tinues absent or infirm, or is dead. The only case in which the presence of a witness whose deposition has been taken is required, if it can be procured at the trial, is where the deposition was taken under the sixth subdivision of said section, which provides for the taking of a deposition "when the witness is the only one who can establish facts or a fact material to the issue." *Johnston v. McDuffee*, 83 Cal. 30. The presence or absence of a party whose deposition has been taken is immaterial, and such deposition may be read on the trial by either party, though the witness be in court when it is read, and though other witnesses are present by whom the same facts can be proved. *Id.*; *Newell v. Desmond*, 74 *id.* 46. The deposition may be read in case of the death of the witness: Cal. Code Civ. Pro., § 2032.

<sup>11</sup> *Lawrence v. Fulton*, 19 Cal. 684.

<sup>12</sup> *Hobbs v. Duff*, 43 Cal. 485.

<sup>13</sup> *Turner v. McIlhaney*, 8 Cal. 575.

<sup>14</sup> *Morton v. Folger*, 15 Cal. 275.

<sup>15</sup> *Heath v. Scott*, 65 Cal. 548; and see *Smith v. Crocker*, 38 N. Y. Supp. 268; 73 N. Y. St. Rep. 749.

<sup>16</sup> *Grigsby v. Schwarz*, 82 Cal. 278.



ject and involving the same issues.<sup>17</sup> But it is otherwise of a deposition taken in a different suit between different parties.<sup>18</sup> The showing that a witness is out of the state is held sufficient to admit his deposition if it appears that, in answer to inquiries made at his former place of business, and of others who knew him, it was said they did not know where he was, but understood that he was out of the state.<sup>19</sup> The reasons which authorized depositions, and which existed at the time they were taken, will be presumed as still in existence at the time of the trial, nothing appearing to the contrary.<sup>20</sup>

**§ 5336. Affidavit for examination of witness.**

*Form No. 1190.*

[TITLE.]

[VENUE.]

A. B., being duly sworn, deposes and says:

I. I am the plaintiff in the above-entitled action.

II. The summons in said action has been served. P. Q. is a witness material and necessary for me on the trial of said action, without the benefit of whose testimony I can not safely proceed to trial; said witness resides in the said county of ....., and is about to leave said ..... county, where said action is pending and is to be tried, and will probably continue absent when his testimony is required. [Or state other facts showing that the case is within section 2021 of the California Code of Civil Procedure.]

III. I am informed and verily believe that it is the intention of said witness to depart from said ..... county, on the ..... day of ....., 18.. I was not aware of his intended departure in time to give five days' notice of the time and place of taking his deposition; and the attorneys for the said defendant reside at ....., in said county.

[JURAT.]

[SIGNATURE.]

<sup>17</sup> Briggs v. Briggs, 80 Cal. 253; Atkins v. Anderson, 63 Iowa, 743; Kerr v. Gibson, 8 Bush, 130; Adams v. Raignier, 69 Mo. 363.

<sup>18</sup> Land Co. v. Weldner, 169 Penn. St. 359.

<sup>19</sup> Renton v. Moimier, 77 Cal. 449; and see Sunol v. Molloy, 63 Id. 369; Bronner v. Frauenthal, 37 N. Y. 166.

<sup>20</sup> Hennessy v. Insurance Co., 8 Wash. St. 91; 40 Am. St. Rep. 892.



§ 5337. Affidavit on motion for commission to examine witness out of state.

*Form No. 1191.*

[TITLE.]

[VENUE.]

A. B., the plaintiff in the above-entitled action, being duly sworn, deposes and says:

That the summons in the said action has been served, and that P. Q. is a witness material and necessary for the said [plaintiff] on the trial of the said action, without the benefit of whose testimony the said [plaintiff] can not safely proceed to trial; that said witness resides in the city of [New York, in the county of New York, in the state of New York], and is out of this state, and will continue absent when his testimony is required.

[JURAT.]

[SIGNATURE.]

§ 5338. **By whom made.** This affidavit may be made by any person acquainted with the facts, if no stay of proceedings is desired.<sup>21</sup> But if otherwise, it will be better that the affidavit should be made by the applicant, or an excuse given for its not being so made.<sup>22</sup>

§ 5339. **What it must show.** It is not necessary to state what facts are expected to be proved by the witness.<sup>23</sup> And advice of counsel as to the same,<sup>24</sup> that witness is absent and will continue absent, must be stated.<sup>25</sup>

§ 5340. **Notice of taking deposition of witness, and time and place of examination, with copy of affidavit.**

*Form No. 1192.*

[TITLE.]

You will please take notice that the depositions of L. M. and N. O., on behalf of the plaintiffs in the above-entitled action,

<sup>21</sup> De Mar v. Van Zandt, 2 Johns. Cas. 69.

<sup>22</sup> See Eaton v. North, 7 Barb. 631. The applicant and not his attorney should make the affidavit. Zeigler v. Lamb, 40 N. Y. Supp. 65; and see Clark v. Sullivan, 8 Id. 565; 55 Hun, 604. See, as to postponement, Cal. Code Civ. Pro., § 2027.

<sup>23</sup> Eaton v. North, 7 Barb. 631. As to the materiality of the witness, see Id.

<sup>24</sup> Beall v. Dey, 7 Wend. 513.

<sup>25</sup> Pooler v. Maples, 1 Wend. 65. As to requisites of affidavit under the New York practice, see Seymour v. Strong, 19 Wend. 98; Warner v. Harvey, 9 Id. 444; Brackett v. Dudley, 1 Cow. 209; Matter of Gains, 36 N. Y. Supp. 113; 25 Civ. Pro. Rep. 243.

to be used on the trial thereof, will be taken before P. Q., a notary public in and for the county of ....., in the state of California, at his office in the city of ....., county of ....., on the ..... day of ....., A. D., 18.., between the hours of nine A. M. and five P. M. of that day; and if not completed on that day, the taking will be continued from day to day successively thereafter, and over Sundays, at the same place, until completed.

And you will further take notice that the annexed is a copy of an affidavit of S. T., one of the said plaintiffs, showing that the case is one mentioned in section 2021 of the California Code of Civil Procedure.

E. F.,  
Attorney for Plaintiffs.

[DATE AND ADDRESS.]

**§ 5341. Order shortening time of notice.**

*Form No. 1193.*

Good cause being shown therefor, it is hereby ordered that the time of giving the foregoing notice is hereby shortened to two days.

A. B.,  
Judge.

[DATE.]

**§ 5342. Notice.** The party desiring to take a deposition within this state must serve on the adverse party a previous notice of the time and place of examination, together with a copy of an affidavit showing that the case is one mentioned in the statute. Such notice must be at least five days, and in addition, one day for every twenty-five miles of the distance of the place of examination from the residence of the person to whom the notice is given, unless, for a cause shown, a judge, by order, prescribe a shorter time. When a shorter time is prescribed, a copy of the order must be served with the notice.<sup>26</sup> Notice of time and place having been given, it is a matter of small importance who took the deposition, particularly in view of the inconvenience and delay which would result from a different rule.<sup>27</sup> Notice must be served upon the attorney for the

<sup>26</sup> Cal. Code Civ. Pro., § 2031. An order shortening the time for which notice shall be given must designate a definite time of notice. *Howell v. Howell*, 66 Cal. 390; see *Bern v. Bern*, 4 S. Dak. 138.

<sup>27</sup> *Williams v. Chadbourne*, 6 Cal. 559. A notice of the taking of

party, where he has one.<sup>28</sup> But proof of service of the notice may be made by parol testimony.<sup>29</sup> A slight error in the title of the cause, where there is no other suit pending between the parties, will not invalidate the notice.<sup>30</sup>

§ 5343. **Waiver of objections.** An appearance at the time and place, and cross-examining the witness, waives whatever objection may be had because the notice is too short.<sup>31</sup>

§ 5344. **Notice of motion for commission to examine witness out of state.**

*Form No. 1194.*

[TITLE.]

The defendant and his attorney will please take notice that upon the within affidavit, and upon the complaint and the papers filed in the above-entitled action, I shall move this honorable court, at the courtroom thereof, in the said county of ..... on the ..... day of ....., A. D., 18.., at the opening of the court on that day, or as soon thereafter as counsel can be heard, that a commission issue out of and under the seal of this honorable court, to take the testimony of F. G., a witness residing out of this state, directed to some proper person residing at the city of ....., in the state of ....., then and there to be selected and appointed by the judge of this court.

E. F.,

Attorney for Plaintiff.

[DATE.]

§ 5345. **Stipulation that deposition of witness may be taken in this state to be used on the trial.**

*Form No. 1195.*

[TITLE.]

It is hereby stipulated that the deposition of R. S., a witness on behalf of the [plaintiff] in the above-entitled action, may a deposition in the city of San Francisco, not designating any place in the city where it would be taken, is insufficient. *Lucas v. Richardson*, 68 Cal. 618. An order providing for the taking of a deposition at a certain hour of the day on which the order was made, and directing a service of the notice "forthwith," is too indefinite. *Howell v. Howell*, 66 Cal. 390.

<sup>28</sup> *Griffith v. Gruner*, 47 Cal. 644; Cal. Code Civ. Pro., § 1015.

<sup>29</sup> *Hobbs v. Duff*, 43 Cal. 485.

<sup>30</sup> *Mills v. Dunlap*, 3 Cal. 94; see, also, Cal. Code Civ. Pro., § 1046.

<sup>31</sup> *Jones v. Love*, 9 Cal. 68; and see *Hobart v. Jones*, 5 Wash. St. 385.

be taken before T. U., a notary public [or any other officer or person agreed upon], in and for the ..... county of ....., in this state, at his office, in said ..... county, on the ..... day of ....., 18.., between the hours of ..... A. M. and ..... P. M. of that day, and if not completed on that day, may be continued from day to day thereafter, and over Sundays, at the same place, until completed. And when so taken, the said deposition may be used on the trial of said action, subject to the same objections (except as to the form of interrogatories), as if the said witness were there personally present and testifying therein.

G. H.,  
Attorney for Defendant.

[DATE.]

**§ 5346. Order for commission to take testimony.**

*Form No. 1196.*

[TITLE.]

Upon reading and filing the affidavit of A. B., and upon the files, papers, and records in this action, and due proof of service of notice of motion having been made and filed, on motion of G. H., Esq., attorney for the defendant in said action:

It is ordered that a commission issue out of and under the seal of this court, directed to J. K., a person agreed upon between the parties, residing at the city of ....., county of ....., in the state of ....., to take the testimony of P. Q., residing at the same place, as a witness on behalf of the defendant, upon such proper interrogatories, direct and cross, as the respective parties may prepare, to be settled, if the parties shall disagree as to their form, by the honorable judge of this court, on the ..... day of ....., 18.., at ..... o'clock in the .....noon, at the courtroom of this court.

**§ 5347. Commission to take testimony.**

*Form No. 1197.*

The people of the state of California to A. B., greeting:

Whereas it appears to our judge of our Superior Court of the county of ....., state of California, that ....., of the ..... of ....., in the ..... of ....., material witness in a certain action now pending in our said Superior Court, between ....., plaintiff, and

....., defendant, and that the personal attendance of said witness can not be procured at the trial of the said action, we, in confidence of your prudence and fidelity, have appointed you, and by these presents do appoint you, a commissioner to examine said witness, and, therefore, we authorize and empower you, at certain days and places, to be by you for that purpose appointed, diligently to examine said witness on the interrogatories annexed to his commission, and upon ....., on ..... oath, first taken before you, and cause the said examination of the said witness to be reduced to writing and signed by the same witness and by yourself, and then return the same annexed to this commission, unto our Superior Court aforesaid, with all convenient speed, inclosed under your seal.

Witness, Hon. ...., Judge of the said Superior Court, at the ....., in the ..... county of ....., this ..... day of ....., A. D., 18..

Attest my hand and seal of said Superior Court, the day and year last above written.

[SEAL OF COURT.]

C. D.,  
Clerk.

**§ 5348. Commission, what to contain.** In general, witnesses to be examined under a commission must be named in it.<sup>32</sup> Where the names are not known to the party, if they are sufficiently described, and their evidence is shown to be material, the commission may be issued describing them.<sup>33</sup> The want of a seal to the commission is a fatal defect.<sup>34</sup>

**§ 5349. Interrogatories, settlements of.** Documents to be identified by the witness, or copies of them, may be annexed to

<sup>32</sup> Wright v. Jessup, 3 Duer, 642; Forrest v. Forrest, 3 Bosw. 661; S. O., 9 Abb. Pr. 289. The real name of the person intended to be examined under the commission must be given to the opposite party and inserted in the commission, in order that the opposite party may intelligently prepare cross-interrogatories. Smith v. Westerfeld, 88 Cal. 374.

<sup>33</sup> Shafer v. Wilcox, 2 Hall, 502. As to the effect of a misnomer, compare Hays v. Phelps, 1 Sandf. 64; Brown v. Southworth, 9 Paige Ch. 351; Blackett v. Lalmbeer, 1 Sandf. Ch. 366; Smith v. Westerfeld, 88 Cal. 374.

<sup>34</sup> Ford v. Williams, 24 N. Y. 359; Tracy v. Suydam, 30 Barb. 110; Whitney v. Wynkoop, 4 Abb. Pr. 370.

the interrogatories;<sup>35</sup> and it is not essential that the originals should be thus attached.<sup>36</sup> Nor can either party be compelled to surrender an original document for this purpose.<sup>37</sup> Objections annexed to the commission and interrogatories, but not called to the attention of the court on the trial, may properly be disregarded.<sup>38</sup>

**§ 5350. Issuance of commission.** If a commission to take the deposition of a witness out of the state is issued on the application of one party without consent of the other, to a person who is not a judge or justice of the peace, or a commissioner appointed by the governor of this state, and the party who does not consent, after the appointment, files cross-interrogatories, and stipulates as to the manner in which the deposition shall be returned, he is estopped from saying that the commissioner was improperly appointed.<sup>39</sup> If the parties stipulate that a commissioner may take a deposition upon written interrogatories, and the stipulation says nothing about the day the same may be taken by the commissioner, it is not necessary that the commissioner state in his certificate the day the same was taken.<sup>40</sup>

**§ 5351. Return.** It is not essential, though it is the better practice, that the return should state that the witnesses were publicly sworn.<sup>41</sup> The direction of the officer who settles the interrogatories should be indorsed on the commission.<sup>42</sup>

<sup>35</sup> *Commercial Bank v. Union Bank*, 11 N. Y. 203.

<sup>36</sup> *Id.*

<sup>37</sup> *Butler v. Lee*, 32 Barb. 75; S. C., 19 How. Pr. 383.

<sup>38</sup> *Farrell v. Palmer*, 36 Cal. 187. As to the practice of settlement under the California practice, and that examination may be without interrogatories, consult Cal. Code Civ. Pro., § 2025. Under New York practice. See *Gilpin v. Daly*, 12 N. Y. Supp. 448; *Dent v. Society*, etc., 16 id. 684; *Krauss v. Hallbelmer*, 29 id. 1106; *Wilcox v. Dodge*, 23 Abb. N. C. 209.

<sup>39</sup> *Crowther v. Rowlandson*, 27 Cal. 383. Issuance of commission. See *Hames v. Judd*, 16 Daly, 110; *Spinney v. Field*, 17 N. Y. Supp. 890; *In re Plumb*, 64 Hun, 317.

<sup>40</sup> *Elgin v. Hill*, 27 Cal. 373.

<sup>41</sup> *Williams v. Eldridge*, 1 Hill, 249; *Halleran v. Field*, 23 Wend. 38. As to the directions for a return, see *Hall v. Barton*, 25 Barb. 274.

<sup>42</sup> *Hurd v. Pendright*, 2 Hill, 502; *Crawford v. Lopes*, 25 Barb. 449.

## § 5352. Deposition.

*Form No. 1198.*

## [TITLE.]

Be it remembered, that pursuant to the stipulation [commission or notice] hereunto annexed, and on the ..... day of ....., 18.., at my office, in the ..... county of ....., state of ....., before me, N. O., a notary public in and for the said ..... county of ....., duly appointed and commissioned to administer oaths, etc., personally appeared P. Q., a witness produced on behalf of the plaintiff in the above-entitled action now pending in the said court, who, being first by me duly sworn, was then and there examined and interrogated by E. F., of counsel for the said plaintiff, and by G. H., of counsel for the said defendant, and testified as follows [questions and answers].

§ 5353. Deposition as evidence. A deposition may be used at any stage of the action or proceeding.<sup>43</sup> The object of the statute is to enable either party to read a deposition admissible in itself, once taken, in any stage of the action or proceeding — not to render it admissible simply because it was taken.<sup>44</sup> Where a deposition had been taken in a case and subsequently an amended pleading was filed, it was held that the deposition might nevertheless be read, if the material issues on the subject-matter to which it related were the same under the amended as under the original pleadings.<sup>45</sup> A motion to suppress the reading of a deposition, before the case in which it was taken is put upon trial, is premature; the proper time to object to such deposition is when it is offered in evidence on the trial.<sup>46</sup> The reading of evidence taken by deposition, although done after the jury have retired, is as much a part of the trial as any other.<sup>47</sup> But *quaere*, whether a party can object, on second trial, to the reading of a deposition which he suffered his adversary to read on the first trial without objection.<sup>48</sup>

<sup>43</sup> Cal. Code Civ. Pro., § 2034.

<sup>44</sup> *Turner v. McIlhaney*, 8 Cal. 575.

<sup>45</sup> *Plo Pico v. Cuyas*, 47 Cal. 174; *Mendenhall v. Kratz*, 14 Wash. St. 453.

<sup>46</sup> *Mills v. Dunlap*, 3 Cal. 94; and see *Pence v. Waugh*, 135 Ind. 143.

<sup>47</sup> *People v. Kohler*, 5 Cal. 72.

<sup>48</sup> *Myers v. Casey*, 14 Cal. 542.

§ 5354. **Deposition excluded.** A whole deposition can not be excluded on the ground that certain questions asked on the examination were improper. The objection to the deposition on this ground must be confined to the particular questions, otherwise any error in permitting the questions will be waived.<sup>49</sup> It is no ground for the exclusion of a deposition that it was noticed to be taken before the county judge, but was taken before the county clerk.<sup>50</sup>

§ 5355. **Exceptions.** Depositions are subject to all legal exceptions at the trial, save only the objection to the form of an interrogatory where the parties attend the examination.<sup>51</sup> There is nothing in the statute which requires that exception to deposition shall be filed before the time of trial. The objection can be made at any time before they are read in evidence.<sup>52</sup> If part of the deposition be liable to the exception of hearsay, this goes only to the rejection of that part, and the objection should be taken at the hearing.<sup>53</sup>

§ 5356. **Form of deposition.** The deposition of each witness must be reduced to writing under the direction of the commissioners,<sup>54</sup> and be subscribed by the witness.<sup>55</sup> And must be certified by the commissioners, who must make a return of the

<sup>49</sup> *Higgins v. Wortell*, 18 Cal. 330. Where a witness refuses to answer a material question, it is not error for the court to exclude the whole deposition. *Hadra v. Utah Nat. Bank*, 9 Utah, 412; see § 5360a, *post*.

<sup>50</sup> *Williams v. Chadbourne*, 6 Cal. 559.

<sup>51</sup> *Lawrence v. Fulton*, 19 Cal. 683; *Nicholson v. Tarpey*, 89 id. 617.

<sup>52</sup> *Dye v. Bailey*, 2 Cal. 384. Under Colorado practice, only such objections, exception and motions in respect to depositions will be considered as are made before trial. *Cowan v. Cowan*, 16 Col. 335; *Love v. Tomlinson*, 1 Col. App. 516. Objections to depositions for defects that may be remedied by retaking can not be made at the trial, but must be taken before the trial is begun. *Lumber Co. v. Garrett*, 28 Oreg. 168; *Foster v. Henderson*, 29 id. 210; *Publishing Co. v. Mayne Co.*, 9 Utah, 318; *Hill v. Smith*, 6 Tex. Civ. App. 312; *Howard v. Mfg. Co.*, 139 U. S. 199; *National Bank v. Dunn*, 106 Ind. 110.

<sup>53</sup> *Myers v. Cascy*, 14 Cal. 542.

<sup>54</sup> *Keane v. Meade*, 3 Pet. 1; *McDonald v. Garrison*, 9 Abb. Pr. 34.

<sup>55</sup> But see *Clarke v. Sawyer*, 3 Sandf. Ch. 351. The fact that the deponents subscribed their names by initials is no reason for suppressing the deposition. *Payne v. June*, 92 Ind. 252.



same in a sealed envelope, directed to the clerk or other person designated or agreed upon, and forwarded to him by mail or other channel of conveyance.<sup>56</sup>

§ 5357. Certificate of notary.

*Form No. 1199.*

State of California, }  
City and County of ..... } ss.:

I, G. H., a notary public in and for said ..... county, do hereby certify that the witness P. Q., in the foregoing deposition named, was by me duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause; that said deposition was taken at the time and place mentioned in the annexed stipulation [commission or notice], to-wit, at my office in said ..... county of ....., in the state of ....., and on the ..... day of ....., 18.., between the hours of ..... and ..... of that day; that said deposition was reduced to writing by me, and when completed was by me carefully read to said witness; and being by him corrected, was by him subscribed in my presence.

In witness whereof I have hereunto subscribed my name and affixed my seal of office, this ..... day of ....., 18..

G. H.,  
Notary Public.

§ 5358. Attestation. A certificate to a deposition must state that the deposition was read to the witness before signing; it must set forth an actual compliance with all the requirements of the statute. The admission of hearsay testimony to a fact admitted by both parties is not error.<sup>57</sup> The attestation or certificate of a notary that an affidavit was sworn to, or affirmed and subscribed before him, is regular, although his seal is not affixed.<sup>58</sup> Courts take judicial notice of the official character of justices of the peace in their own states. And an affidavit in which the official character of the justice before whom it is taken does not appear is good.<sup>59</sup> And where it was stipulated by the attorneys for the parties that a deposition might be taken before L. P. F., a justice of the peace in a foreign country, it

<sup>56</sup> Cal. Code Civ. Pro., § 2026.

<sup>57</sup> *Williams v. Chadbourne*, 6 Cal. 559; and see *McCormick v. Largey*, 1 Mont. 158.

<sup>58</sup> *Mills v. Dunlap*, 3 Cal. 97.

<sup>59</sup> *Ede v. Johnson*, 15 Cal. 53.

was held that this was a concession that there was such a person occupying such office, and an agreement upon that person to take the deposition.<sup>60</sup>

§ 5359. **Certificate of commissioner.** If at the end of a deposition taken by a commissioner out of the state there is a *jurat* giving the date when the deposition was subscribed and sworn to, it is not necessary that the further certificate of compliance with section 430 of the California Practice Act<sup>61</sup> should be dated.<sup>62</sup> It is not necessary to append the statutory certificate to the deposition of each witness when two or more give their depositions for the same party at the same time, and before the same officer; one certificate in due form to all such depositions when securely attached together is sufficient.<sup>63</sup>

§ 5360. **Certificate of mailing — indorsed on the envelope.**

*Form No. 1200.*

Deposited in the post-office at ..... and the postage thereon paid by me, this ..... day of ....., 18..  
[SIGNATURE OF ....., COMMISSIONER.]

§ 5360a. **Failure to answer interrogatory — objection.** An objection to the admission in evidence of a deposition, on the grounds that the witness had neglected to answer certain interrogatories put by the party objecting, and that the deposition was not complete or responsive, in order to be available, must call the attention of the court to the particular interrogatories which the witness had refused to answer, or the answer to which was evasive or not fully responsive.<sup>64</sup>

<sup>60</sup> Blackie v. Cooney, 8 Nev. 41.

<sup>61</sup> Cal. Code Civ. Pro., § 2032.

<sup>62</sup> Elgin v. Hill, 27 Cal. 373.

<sup>63</sup> Pralus v. Pacific G. & S. M. Co., 35 Cal. 30. As to sufficiency of certificate, consult Hobart v. Jones, 5 Wash. St. 385; Clark v. Ellis, 9 Oreg. 128; Metcalf v. Prescott, 10 Mont. 294; Moore v. Booker, 4 N. Dak. 543; Payne v. West, 99 Ind. 390; Curtis v. Curtis, 131 id. 489. It is immaterial whether a notary's certificate is at the beginning or end of a deposition. Murray v. Larable, 8 Mont. 208. Under Colorado practice, all objections to the manner of certifying and returning a deposition are waived unless presented before the trial. Walker v. Steel, 9 Col. 388; also, Murray v. Larable, 8 Mont. 208. Faulty certificate. See Mining Co. v. Molson, 12 Col. 405.

<sup>64</sup> Gassen v. Hendrick, 74 Cal. 444; Valton v. National, etc., Co., 20 N. Y. 34.

§ 5360b. **Objections — waiver.** Error in admitting depositions in evidence, without preliminary proof that the witnesses resided out of the county where the cause was being tried, is waived, if the party against whom the depositions were offered dispensed with the formal proof of such fact on the trial, and accepted the verbal statement of the opposing counsel as to their nonresidence.<sup>65</sup> An objection that the certificate to a deposition did not show that the deposition was taken by the person to whom the commission was addressed, nor in the official capacity designated therein, must be taken by motion to suppress before the trial is begun, otherwise it will be deemed waived.<sup>66</sup>

§ 5360c. **Opening depositions by mistake.** Depositions opened by the clerk by mistake but at once sealed up and kept in his custody until regularly ordered to be published by the court, may, within the discretion of the court, be used upon the trial.<sup>67</sup>

§ 5360d. **Depositions — how taken on interrogatories.** The deposition of a witness residing in the state can only be legally taken on interrogatories under a commission directed to the officer, and it is irregular for the officer to take the deposition upon questions furnished by the attorney of a party to the cause of action.<sup>68</sup>

§ 5360e. **The same — striking out answers.** Answers to interrogatories contained in a deposition, if based upon statements made by other persons to the witness, are hearsay, and should be stricken out on motion.<sup>69</sup> And if, in a deposition, an answer be not responsive to the interrogatory, it may be stricken out.<sup>70</sup>

<sup>65</sup> Estate of Learned, 70 Cal. 140.

<sup>66</sup> Lumber Co. v. Garrett, 28 Oreg. 168; and see, to same effect, Murray v. Larable, 8 Mont. 208.

<sup>67</sup> Mendenhall v. Kratz, 14 Wash. St. 453; Spear v. Richardson, 37 N. H. 23.

<sup>68</sup> Troth v. Crow, 1 Col. App. 453.

<sup>69</sup> Amann v. Lowell, 66 Cal. 306.

<sup>70</sup> Golden Gate, etc., Min. Co. v. Mining Works, 82 Cal. 184.

## CHAPTER XI.

### TENDER.

§ 5361. **In general.** Section 2074 of the California Code of Civil Procedure provides that "an offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property;" otherwise, in order to constitute a valid tender, the money or thing must be produced. The production of it must be proved, with an actual offer of it to the creditor, unless it be shown that the latter dispensed with it by some positive act or declaration to that effect. Having the money in one's pocket or elsewhere, and offering to pay without producing the money, is not enough; there must be an actual offer and presentation, so that the creditor can either take or refuse it at his option;<sup>1</sup> and it must be unconditional;<sup>2</sup> except such conditions as were by the terms of the contract conditions precedent to the performance thereof.<sup>3</sup> So an offer to pay, provided the other party will give a receipt in full, is not a sufficient tender.<sup>4</sup> But a receipt for the money paid, or for the delivery of an instrument or property, may be demanded as a condition of the payment or delivery.<sup>5</sup> And the tender must be kept at all times ready for payment.<sup>6</sup>

<sup>1</sup> *Bakeman v. Podler*, 15 Wend. 637; *Dunham v. Jackson*, 6 id. 22; *Strong v. Blake*, 46 Barb. 227; *Englander v. Rogers*, 41 Cal. 420.

<sup>2</sup> *Roosevelt v. Bull's Head Bank*, 45 Barb. 579; see *Barnhart v. Fulkerth*, 73 Cal. 526.

<sup>3</sup> *Wheelock v. Tanner*, 39 N. Y. 481.

<sup>4</sup> *Clark v. Mayor of N. Y.*, 1 Keyes, 9.

<sup>5</sup> Cal. Code Civ. Pro., § 2075.

<sup>6</sup> *Roosevelt v. Bull's Head Bank*, 45 Barb. 579; *Redington v. Chase*, 34 Cal. 666; *Bryan v. Maume*, 28 id. 238; Cal. Code Civ. Pro., § 1830; *Wolff v. Railway Co.*, 89 Cal. 332; *Knowles v. Murphy*, 107 id. 107; *Adams v. Rutherford*, 13 Oreg. 78. See, as to tender generally, *Karker v. Haverly*, 50 Barb. 79; *Clark v. Mayor*, 1 Keyes, 9; Cal. Civ. Code, §§ 1485 to 1505. Under the statute of California and decisions of our courts, see, generally, Cal. Code Civ. Pro., §§ 704, 1030, 2074, and 2075. On sale and delivery. *Id.*; *Lamott v. Butler*, 18 Cal. 32. Money tender. *Curiac v. Abadle*, 25 Cal. 502. As to legal-tender notes, see *Vilhac v. Biven*, 28 Cal. 409. When necessary to maintain action. *Folsom v. Bartlett*, 2 Cal. 163; *Vance v. Dingley*, 14 id. 53; *Crosby v. Watkins*, 12 id. 85. When not neces-

**§ 5362. Effect of tender.** Where, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for the plaintiff, the amount so tendered, and the allegation be found to be true, the plaintiff can not recover costs, but must pay costs to the defendant.<sup>7</sup> In such case, judgment should be for the plaintiff for the amount tendered, and for the defendant for his costs.<sup>8</sup> The defendant, to entitle himself to costs, must not only aver a tender, but that he has always been and is ready to pay the sum tendered, and must bring it into court.<sup>9</sup> A tender of the principal and interest to the date of the tender stops interest from the time of the tender.<sup>10</sup> The tender of the amount due on a debt secured by a mortgage does not release the lien.<sup>11</sup>

**§ 5363. Objections to tender.** The person to whom a tender is made must, at the time, specify any objections he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards.<sup>12</sup>

sary See *Goodale v. West*, 5 Cal. 339. By whom made. *Mahler v. Newbaur*, 32 Cal. 168; 91 Am. Dec. 571; see, generally. *People v. Hays*, 4 Cal. 127; *Gaven v. Hagen*, 15 id. 208; *Redington v. Chase*, 34 id. 366; id. 616; *Tompkins v. Batie*, 11 Neb. 147; 38 Am. Rep. 361; *Pinney v. Jorgensen*, 27 Minn. 26; *Weaver v. Nugent*, 72 Tex. 272; 13 Am. St. Rep. 792; *Noyes v. Wyckoff*, 114 N. Y. 204; *Henderson v. Cass County*, 107 Mo. 50.

<sup>7</sup> Cal. Code Civ. Pro., § 1030.

<sup>8</sup> *Curlac v. Abadle*, 25 Cal. 502.

<sup>9</sup> *Bryan v. Maume*, 28 Cal. 238.

<sup>10</sup> *Patterson v. Sharp*, 41 Cal. 133; Cal. Civil Code, § 1504. A tender which is not kept good does not have the effect of stopping interest. *Thornburgh v. Fish*, 11 Mont. 53. Effect of tender. See *Oregon Railway, etc., Co. v. Oregon, etc., Co.*, 10 Oreg. 444; *Simpson v. Carson*, 11 id. 361. A tender of a sum less than the amount found due is not available as a defense. *Lumber Co. v. Reynolds*, 111 Cal. 588; unless no objection was made at the time as to the amount. *Oakland Bank of Savings v. Applegarth*, 67 Cal. 86. Tender of performance. See *Hyde v. Heller*, 10 Wash. St. 586.

<sup>11</sup> *Perre v. Castro*, 14 Cal. 530; *Himmelman v. Fitzpatrick*, 50 id. 650; see, also, *Hawkins v. Hill*, 15 id. 499; 76 Am. Dec. 499; *Mahler v. Newbaur*, 32 Cal. 168; 91 Am. Dec. 571.

<sup>12</sup> Cal. Code Civ. Pro., § 2076; *Oakland Bank of Savings v. Applegarth*, 67 Cal. 86.

# PART FIFTEENTH.

## CERTIORARI, MANDAMUS, ETC.

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### CHAPTER I.

#### CERTIORARI, OR WRIT OF REVIEW.

§ 5364. **In general.** The writ of *certiorari* may be denominated the writ of review.<sup>1</sup> When a new jurisdiction, unknown to the common law, is created by the statute, a writ of error will not lie, but a *certiorari* will.<sup>2</sup> So, in the absence of express prohibition, when a court acts in a summary manner, or in a new course different from the common law, *certiorari* will lie.<sup>3</sup> It is issued from a Superior Court, directed to one of inferior jurisdiction, commanding the latter to certify and return to the former the record in the particular case.<sup>4</sup> It is usually employed to review the proceedings of courts not of record, municipal corporations, special tribunals, commissioners, and officers exercising judicial powers which affect the citizen in his rights or property, and acting in a summary way.<sup>5</sup> It is sometimes used as an auxiliary process, in order to obtain a full return to some other process, as in case of a diminution of record in an appeal it may be awarded to require a perfect transcript of all the papers.<sup>6</sup> At common law, the writ of *certiorari* tries

<sup>1</sup> Cal. Code Civ. Pro., § 1067; *Noble v. Superior Court*, 109 Cal. 523; *Union Pac. Railway Co. v. Bowler*, 4 Col. App. 25.

<sup>2</sup> 2 Tidd, 1051; *Campbell v. Strong*, Hempst. 195.

<sup>3</sup> *Tierney v. Dodge*, 9 Minor, 166; *State v. Dodge County*, 56 Wis. 79.

<sup>4</sup> *Bac. Abr. h, t*; 4 Vin. Abr. 330; *Bouv.* 215; *Commissioners, etc. v. Supervisors, etc.*, 27 Ill. 140; *State v. Tingler*, 32 W. Va. 546; 25 Am. St. Rep. 830.

<sup>5</sup> *Puterbaugh's Pl. & Pr.* 543; *State v. Mansfield*, 34 Minn. 250; *Esmeralda v. District Court*, 18 Nev. 438; *State v. State Board of Assessment, etc.*, 3 S. Dak. 338.

<sup>6</sup> *Holmes v. Parker*, 1 Scam. 567; *Jones v. Sprague*, 2 id. 55; *Sweet v. Overseers, etc.*, 3 Johns. 23; *Brown v. Osborne*, 1 Blackf. 32;

nothing but the jurisdiction, and incidentally the regularity of the proceedings upon which the jurisdiction depends. The review never extends to the merits; upon these the action of the inferior tribunal is final and conclusive, and our statute is affirmatory of the common law.<sup>7</sup>

§ 5365. **Jurisdiction to issue writ.** The Supreme Court of the state of California may exercise its appellate jurisdiction by means of the writ of *certiorari*,<sup>8</sup> but not where the review might have been had by an appeal,<sup>9</sup> unless possibly under extraordinary circumstances.<sup>10</sup> If there is any other plain, speedy, and adequate remedy, the writ of *certiorari* will not lie.<sup>11</sup> It may issue the writ to the District Court for the purpose of reviewing summary proceedings, where no appeal would lie,<sup>12</sup> or to inferior courts, in every case within its reach, where such courts exceed their powers.<sup>13</sup> But its jurisdiction to review the proceedings of inferior courts, boards, and officers, upon *certiorari*, is limited to cases where there has been an excess of jurisdiction,<sup>14</sup> it being

*Stewart v. Ingle*, 9 Wheat. 526; *Scott v. Hull*, 2 Munf. 229; *Colden v. Knickerbocker*, 2 Cow. 38; *Smick v. Opdyke*, 7 Halst. 85; *Clark v. Hackett*, 1 Blackf. 77; *Barton v. Petit*, 7 Cranch, 288; *Field v. Milton*, 3 id. 514; *Commissioners, etc. v. Griffin*, 134 Ill. 330; *State v. District Court*, 14 Mont. 452.

<sup>7</sup> *People v. Board of Delegates, etc.*, 14 Cal. 479; Cal. Code Civ. Pro., § 1074; *Quinchard v. Board of Trustees, etc.*, 113 Cal. 664; *Farmers', etc., Bank v. Board of Equalization*, 97 id. 318; *Gerdes v. Champlon*, 134 Ill. 330.

<sup>8</sup> *People v. Turner*, 1 Cal. 144; 52 Am. Dec. 295.

<sup>9</sup> *Milliken v. Huber*, 21 Cal. 166; *Bennett v. Wallace*, 43 id. 25; *Faut v. Mason*, 47 id. 8; *Slavonic, etc., Ass'n v. Superior Court*, 65 id. 500; *Newman v. Superior Court*, 62 id. 545; *McCue v. Superior Court*, 71 id. 545; *Weill v. Light*, 98 id. 193; *Estate of McConnell*, 74 id. 217; *Kearns v. Follansby*, 15 Oreg. 597; *Sioux Falls Nat. Bank v. McKee*, 3 S. Dak. 1; *Gregory v. Dixon*, 7 Wash. St. 27.

<sup>10</sup> *Keys v. Marin Co.*, 42 Cal. 254.

<sup>11</sup> Cases cited *supra*, and *People v. Turner*, 1 Cal. 152; *People v. Board of Delegates, etc.*, 14 id. 498; *Noble v. Superior Court*, 109 id. 523; *Union Pac. Railway Co. v. Bowler*, 4 Col. App. 25.

<sup>12</sup> *People v. Turner*, 1 Cal. 144.

<sup>13</sup> *In re Hanson*, 2 Cal. 263; *California Pacific R. R. Co. v. Central Pacific R. R. Co.*, 47 id. 528; see § 123, *ante*.

<sup>14</sup> *People v. Johnson*, 30 Cal. 98; *State, etc. v. Fifth District Court*, 1 West Coast Rep. 630; *Nunan v. Superior Court*, 3 id. 433; *Holbrook v. Superior Court*, 106 Cal. 589; *White v. Superior Court*, 110 id. 60; *Sayers v. Superior Court*, 84 id. 642; *State v. Judge, etc.*, 10 Mont. 401. The inquiry upon *certiorari* is limited to whether the

one of the principal objects of the writ to keep inferior courts and tribunals within their jurisdiction.<sup>15</sup> The amended Constitution confers upon the Supreme Court original jurisdiction in the issuance of this writ.<sup>16</sup> A writ of review may be granted by any court, except a Police or Justice's Court, where an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy.<sup>17</sup> Superior judges have power to issue writs of *certiorari*, and to hear them on their return at chambers.<sup>18</sup> It is not necessary that a court have appellate jurisdiction; the writ may issue from a Superior Court to an inferior judge.<sup>19</sup> But where the error complained of might have been corrected by appeal to the County Court, District Courts can not entertain jurisdiction by *certiorari*.<sup>20</sup> The paraphrase in the California Constitution, "all cases at law which involve the title or possession to real property," as given in *Holman v. Taylor*, 31 Cal. 338, would be more correct if given in this language: "Cases at law in which the title or right of possession of real property is a material fact in the case upon which the plaintiff

court below exceeded its jurisdiction or greatly abused its discretion. *People v. District Court*, 22 Cal. 422.

<sup>15</sup> *Combs v. Duniap*, 19 Wis. 591.

<sup>16</sup> *Miller v. Board of Supervisors*, 25 Cal. 95.

<sup>17</sup> Cal. Code Civ. Pro., § 1068. But a writ of review or *certiorari* will not lie to review the action of an inferior tribunal or board in the exercise of purely legislative functions which are not judicial in their character. *Wulzen v. Board of Supervisors*, 101 Cal. 15; *Water Works v. Bryant*, 52 id. 133; *People v. Board of Education*, 54 id. 375; *Quinchard v. Board of Trustees*, 113 id. 664.

<sup>18</sup> *People v. Supervisors of Marin Co.*, 10 Cal. 346.

<sup>19</sup> *Ohard v. Harrison*, 7 Cal. 113; *People v. Board of Supervisors*, 8 id. 58. See, as to review of the action of a board of supervisors in the granting of a ferry license, *Murray v. Board of Supervisors*, 23 Cal. 498; *Rex v. Inhabitants*, 1 Ld. Raym. 580; *Lawton v. Commissioners of Cambridge*, 2 Cal. 179; *Le Roy v. Mayor of New York*, 20 Johns. 430; *Lynde v. Noble*, id. 80; *Bradhurst v. First Great S. W. Turnpike Co.*, 16 id. 80; *Ex parte Mayor of Albany*, 23 Wend. 277.

<sup>20</sup> *Gray v. Schupp*, 4 Cal. 185. The original jurisdiction of the Supreme Court of South Dakota includes the power to issue, hear, and determine a writ of *certiorari* under such regulations as may be prescribed by law. *State v. Commissioners*, 1 S. Dak. 292. Issue of writ by North Dakota courts. See *State v. Nelson County*, 1 N. Dak. 88; 26 Am. St. Rep. 609.



relies for a recovery or the defendant for a defense." It was not intended by the Constitution to withdraw from justices of the peace jurisdiction in actions of trespass, founded upon the possession of real estate, but only where the right of possession was an issuable fact in the case.<sup>21</sup>

§ 5366. *When it will lie.* There must have been an excess of jurisdiction before the court can interfere by *certiorari*.<sup>22</sup> Its office is to bring up for review final determinations and adjudications of inferior tribunals, etc.<sup>23</sup> Where error has occurred in proceedings, either civil or criminal, which can not be reached by a writ of error, the writ of *certiorari* is a proper remedy to correct such error, unless some other statutory remedy has been given.<sup>24</sup> So in case of an order of the District Court fining and imprisoning for a contempt, without setting forth the facts.<sup>25</sup> When the appellant claims that the statement is necessary, as the errors upon which he relies appear upon the face of the record, the court errs in overruling the objection, as it was error within, and not an excess of jurisdiction, for which relief can be had by *certiorari*.<sup>26</sup> So where a writ of *mandamus* was issued by the county clerk, commanding the clerk to issue a writ of restitution upon *remittitur* filed in the District Court.<sup>27</sup> So where a County Court exercises the power in a judicial capacity which properly belongs to the board of supervisors in a nonjudicial capacity, as the granting of a ferry license.<sup>28</sup> So where a board exercises a judicial power, as rendering a decision in a contested election case; whether the board has exceeded its jurisdiction is properly subject to review on *certiorari*.<sup>29</sup> As to how far and when the proceedings of such boards are judicial, and hence reviewable on *certiorari*, and how far and when legislative, and hence not so to be reviewed,

<sup>21</sup> Pollock v. Cummings, 38 Cal. 685.

<sup>22</sup> Coulter v. Stark, 7 Cal. 245; Wratten v. Wilson, 22 id. 465; Winter v. Fitzpatrick, 35 id. 269; see § 5364, *ante*.

<sup>23</sup> People v. County Judge, 40 Cal. 480; § 5364, *ante*.

<sup>24</sup> People v. Turner, 1 Cal. 152.

<sup>25</sup> *Ex parte Field*, 1 Cal. 187; and see *State v. District Court*, 13 Mont. 347; compare *Golden Gate, etc., Co. v. Superior Court*, 65 Cal. 187.

<sup>26</sup> People v. Burney, 29 Cal. 459.

<sup>27</sup> Clary v. Hoagland, 5 Cal. 476.

<sup>28</sup> Chard v. Harrison, 7 Cal. 113.

<sup>29</sup> People, etc. v. Board of Delegates, etc., 14 Cal. 479.

discussed.<sup>30</sup> A writ of *certiorari* will lie in the District Court to review the action of the board of supervisors,<sup>31</sup> when partaking of a judicial character;<sup>32</sup> but not when purely legislative.<sup>33</sup> So where the board of supervisors reject an official bond for any other reason than that it is not in form and substance in compliance with the requirements of the statute, or is not executed by sufficient and responsible sureties.<sup>34</sup> Where plaintiff seeks to enjoin a sale of personal property, under an execution issued upon a judgment recovered against him in a Justice's Court, if the time for appeal has elapsed, he can apply to the County Court for a writ of *certiorari*, and thus review the action of the justice in rendering the judgment so far as the question of jurisdiction is concerned.<sup>35</sup> In Michigan it will lie to review the order of the Circuit Court.<sup>36</sup> In Wisconsin, applications to the Supreme Court for writs of *certiorari* to justices of the peace will not be entertained unless satisfactory reasons are shown for not obtaining the same from a Circuit Court or judge.<sup>37</sup> A judgment in a Justice's Court void for want of jurisdiction will be reversed on *certiorari*.<sup>38</sup> In Minnesota it will lie to review the action of the Circuit Court in certain proceedings not subject to appeal.<sup>39</sup> It lies from the Probate Court to a Justice's Court.<sup>40</sup> The Circuit Court of the District of Columbia has jurisdiction to issue a *certiorari* to a justice of the peace in a case of forcible entry and detainer.<sup>41</sup>

<sup>30</sup> *Robinson v. Board of Supervisors of Sacramento*, 16 Cal. 208; see, also, *Supervisors, etc. v. Briggs*, 2 Den. 26; *Orange Co. Bank v. Brown*, 9 Wend. 108; *Gillespie v. Broas*, 23 Barb. 370; *Fall v. Paine*, 23 Cal. 303; *Wulzen v. Board of Supervisors*, 101 id. 15.

<sup>31</sup> *People v. Supervisors El Dorado Co.*, 8 Cal. 59.

<sup>32</sup> *Hastings v. City and County of San Francisco*, 18 Cal. 49.

<sup>33</sup> *Williams v. Supervisors*, 65 Cal. 160.

<sup>34</sup> *Miller v. Board of Supervisors, etc.*, 25 Cal. 94.

<sup>35</sup> *Comstock v. Clemens*, 19 Cal. 78.

<sup>36</sup> *Jerome v. Williams*, 13 Mich. 521.

<sup>37</sup> *Hurlbut v. Wilcox*, 19 Wis. 419.

<sup>38</sup> *Combs v. Dunlap*, 19 Wis. 591.

<sup>39</sup> *Faribault v. Hulett*, 10 Minn. 30.

<sup>40</sup> *Paul v. Armstrong*, 1 Nev. 82.

<sup>41</sup> *Holmead v. Smith*, 5 Cranch C. C. 343; *United States v. Browning*, 1 id. 500; *United States v. Donahoe*, id. 474. Review of action of justice of the peace on *certiorari*. *State v. Johnson*, 14 Mont. 526; *State v. Evans*, 13 id. 239; *State v. Case*, 14 id. 520; *Union County v. Slocum*, 16 Oreg. 237; *Prickett v. Oleek*, 13 id. 415; *Weimmer v. Sutherland*, 74 Cal. 341. *Certiorari* to annul appointment of receiver. *Smith v. Superior Court*, 97 Cal. 348. Remedy by *certiorari*

§ 5367. When the writ will not lie. A writ of *certiorari* is not the proper remedy where there has been no excess of jurisdiction. If it had jurisdiction, but decided wrongly, *certiorari* will not lie,<sup>42</sup> or merely from defect of jurisdiction.<sup>43</sup> Where the Superior Court has not exclusive or original jurisdiction, a *certiorari* can not be maintained.<sup>44</sup> It does not lie to an inferior tribunal, except to remove proceedings which remain before it.<sup>45</sup> A *certiorari* to the board of supervisors, on the ground of want of jurisdiction, is premature, if taken before the action of the board,<sup>46</sup> as a *certiorari* is not allowed before the case is finally adjudicated below.<sup>47</sup> So in case of forcible entry and detainer it is premature until there is something to remove.<sup>48</sup> So in proceedings before the board of supervisors.<sup>49</sup> It ought not to is-

where a city alderman has been disturbed in the enjoyment of his office. *Board of Aldermen v. Darrow*, 13 Cal. 460. Review by *certiorari* of action of highway commissioners. *Deltrick v. Commissioners*, 6 Ill. App. 70; of school trustees. *State v. Whitford*, 54 Wis. 150; of board of supervisors. *Herrick v. Carpenter*, 54 Iowa, 340; see *Johnston v. Board of Supervisors*, 104 Cal. 390. An order of the Superior Court extending the time in which a defendant might plead until ten days after the receipt of the *remittitur* in another action then pending on appeal in the Supreme Court, in so far as it attempts to extend the time to plead more than thirty days, is in excess of the jurisdiction of the Superior Court, and may be reviewed on *certiorari*. *Baker v. Superior Court*, 71 Cal. 583; and see *Gibson v. Superior Court*, 83 id. 643.

<sup>42</sup> *People v. Burney*, 29 Cal. 460; *People v. Dwinelle*, id. 635; *Barber v. San Francisco*, 42 id. 630; *Yenawine v. Richter*, 43 id. 312; *Petty v. County Court, etc.*, 45 id. 246; *Monreal v. Bush*, 46 id. 79; *C. P. R. R. Co. v. Placer County*, id. 670; *Reynolds v. County Court, etc.*, 47 id. 604; *Coulter v. Stark*, 7 id. 244; § 5364, *ante*.

<sup>43</sup> *Fowler v. Lindsey*, 3 Dall. 411; to the contrary, *Kennedy v. Gorman*, 4 Cranch C. C. 347.

<sup>44</sup> *Fowler v. Lindsey*, 3 Dall. 411.

<sup>45</sup> *People v. Highway Commissioners*, 30 N. Y. 72.

<sup>46</sup> *Wilson v. Supervisors*, 3 Cal. 386.

<sup>47</sup> *Lynde v. Noble*, 20 Johns. 80; *Husted's Case*, 17 Abb. Pr. 326. The writ will not lie so long as proceedings remain *in fieri*. *Sayers v. Superior Court*, 84 Cal. 642; and see *Weill v. Light*, 98 id. 193; *Schwarz v. County Court*, 14 Col. 44.

<sup>48</sup> *Haines v. Backus*, 4 Wend. 213.

<sup>49</sup> *Lynde v. Noble*, 20 Johns. 80; *People v. Bogart*, 3 Abb. Pr. 194; *Boughton v. Smith*, 26 Barb. 637; *People v. Livingston Co.*, 43 id. 232; *Lamb v. Schottler*, 54 Cal. 319. As to limitation of time in which to apply for writ of *certiorari* in cases of the review of assessments, see *People ex rel. Metropolitan Bank v. Commissioners of Taxes*, 43 Barb. 494.

sue after a limit of a writ of error.<sup>50</sup> It will not lie after five years.<sup>51</sup> *Certiorari* will not lie in case of property taken for public use without compensation;<sup>52</sup> nor in case of a resolution of a board of supervisors to raise money upon the credit of the county;<sup>53</sup> nor to review proceedings of tax commissioners after the assessment-rolls have been delivered;<sup>54</sup> nor, it seems, where the object of a writ of *habeas corpus* is to inquire whether there is probable cause for commitment;<sup>55</sup> nor to bring proceedings in insolvency cases before the Supreme Court;<sup>56</sup> nor to bring up for review an erroneous decision of the County Court in overruling a demurrer;<sup>57</sup> nor to review the action of the District Court in punishing as for contempt.<sup>58</sup> It will not lie to bring up proceedings of a justice against tenants holding over.<sup>59</sup>

<sup>50</sup> *Elmendorf v. Mayor of N. Y.*, 25 Wend. 693; *People v. Mayor of N. Y.*, 2 Abb. Pr. 9. \*

<sup>51</sup> *Vaughn v. Marshall*, 1 Houst. 348.

<sup>52</sup> *People ex rel. Cook v. Nearing*, 27 N. Y. 306; *Lamb v. Schottler*, 54 Cal. 319.

<sup>53</sup> *People ex rel. Dickenson v. Supervisors*, 43 Barb. 232.

<sup>54</sup> *People v. Commissioners of Taxes*, 43 Barb. 494.

<sup>55</sup> *Walton v. Gatlin*, 1 Wins. (N. C.) 318.

<sup>56</sup> *People, etc. v. Shepard*, 28 Cal. 115.

<sup>57</sup> *People, etc. v. Burney*, 29 Cal. 459.

<sup>58</sup> *People, etc. v. Dwinelle*, 29 Cal. 632.

<sup>59</sup> *Lenox v. Arguelles*, 4 Cranch C. C. 477. *Certiorari* can not be employed to prevent a threatend excess of jurisdiction. *Sayers v. Superior Court*, 84 Cal. 642. It will not lie to review an appealable order or judgment either before or after the expiration of the time limited by law for appealing therefrom. *Stutmeister v. Superior Court*, 71 Cal. 322; *McCue v. Superior Court*, id. 545; *In re McConnell*, 74 id. 217; *Lewis v. Gilbert*, 5 Wash. St. 534; *Railroad Co. v. District Court*, 21 Nev. 409. If the court has jurisdiction to hear and decide a motion before it, its decision thereon can not be reversed or annulled upon *certiorari*, no matter whether the decision was right or wrong, upon the evidence before the court. *History Co. v. Light*, 97 Cal. 56; and see *Holbrook v. Superior Court*, 106 id. 589. Errors and irregularities in Justice's Court, where the court has jurisdiction, will not be examined into on *certiorari*. *Sherer v. Superior Court*, 94 Cal. 354. Judgment by default rendered by a justice, even if erroneous, will not be reviewed on *certiorari* when the court had jurisdiction of the subject-matter and of the person of the defendant. *Reagan v. Justice's Court*, 75 Cal. 253; and see *Saunders v. Nursery*, 6 Utah, 431; *Ducheneau v. House*, 4 id. 363. An order setting aside a default is appealable, and is not reviewable on *certiorari*. *Gibson v. Superior Court*, 83 Cal. 643. *Certiorari* will not issue to review the action of a trial court in granting a new trial. *State v. Superior Court*, 6 Wash. St. 201; nor to review a

§ 5368. **What subject to review.** The jurisdiction of the Supreme Court, on appeal from a judgment of the Superior Court rendered in a *certiorari* case, does not depend upon the amount in controversy. The only question the Supreme Court looks into is to ascertain whether the inferior tribunal, board, or officer had jurisdiction, and if not, whether there is any appeal or other plain, speedy, and adequate remedy.<sup>60</sup> The Supreme Court, on *certiorari*, will only inquire whether the inferior court exceeded its jurisdiction.<sup>61</sup> It can not review mere errors of law of the County Court, in cases where it has jurisdiction, even though there is no appeal;<sup>62</sup> it can not review questions of fact,<sup>63</sup> though the review by the courts extends to every issue of law and fact involved in the question of jurisdiction;<sup>64</sup> but it never extends to the merits.<sup>65</sup> *Certiorari* tries nothing but the jurisdiction, and incidentally the regularity of the proceedings upon which the jurisdiction depends.<sup>66</sup> The decision of the inferior court, establishing the existence of a fact essential to the exercise of its jurisdiction, is subject to review on *certiorari*.<sup>67</sup> Except in cases of fraud, an order allowing a claim against a county by a board of supervisors must be reviewed by *certiorari*.<sup>68</sup> The de-

judgment which has been fully paid and satisfied. *Morton v. Superior Court*, 65 Cal. 496; nor to review the action of the Superior Court in denying the plaintiff's motion for judgment after a finding in his favor upon a plea in abatement, and granting leave to defendant to further plead. *State v. Superior Court*, 9 Wash. St. 366. The writ can not be directed to an ex-official after he has parted with the record sought to be reviewed. *In re Dance*, 2 N. Dak. 184.

<sup>60</sup> *Winter v. Fitzpatrick*, 35 Cal. 269.

<sup>61</sup> *People v. Dwinelle*, 29 Cal. 632; *Buckley v. Superior Court*, 96 Id. 119; *State v. Judge, etc.*, 10 Mont. 401; *People ex rel. Porter v. City of Rochester*, 21 Barb. 656; *People v. Overseers*, 6 How. Pr. 25; *Stone v. Mayor of New York*, 25 Wend. 157.

<sup>62</sup> *People v. Burney*, 20 Cal. 459.

<sup>63</sup> *Allen v. Commissioners*, 19 Wend. 342; *Garvin v. Gorman*, 63 Mich. 221; *Schirott v. Phillippi*, 3 Oreg. 484.

<sup>64</sup> *People, etc. v. Board of Delegates, etc.*, 14 Cal. 479.

<sup>65</sup> *Id.*; *People v. Mayor of New York*, 2 Hill. 9; *Haviland v. White*, 7 How. Pr. 154; *contra*, *Carter v. Newbold*, *id.* 166; compare *People v. Board of Supervisors*, 77 Cal. 136; *Onesti v. Freelon*, 61 *id.* 625.

<sup>66</sup> *Whitney v. Board of Delegates*, 14 Cal. 500; *Smith v. Portland*, 25 Oreg. 297.

<sup>67</sup> *Lowe v. Alexander*, 15 Cal. 300.

<sup>68</sup> *El Dorado Co. v. Elstner*, 18 Cal. 144. *Certiorari* will not lie to annul the action of a board of supervisors in denying an application for a license to sell liquor at retail. *Knox v. Rainbow*, 111 Cal. 539.

cision of the board of delegates, in the case of a contested election for chief engineer, is a judicial decision, and subject to review by the courts on *certiorari*. The extent of such review is simply to inquire whether the board has exceeded its jurisdiction.<sup>69</sup> A *certiorari* can not be sued by a purchaser of property who was not a party to the proceedings for seizure, as his rights are not affected thereby.<sup>70</sup> The test as to the right of review is whether the person seeking to review was a party to the proceeding sought to be reviewed;<sup>71</sup> and where a party has no interest in the proceedings, he can not prosecute a *certiorari*.<sup>72</sup>

§ 5369. Writ of certiorari to review acts of a board of supervisors.

Form No. 1201.

[TITLE.]

The people of the state of California to the board of supervisors of the county of .....

Whereas it has appeared to us by the affidavit of ..... that lately before you, or a majority of you, composing at the time the board of supervisors of the county of ....., such proceedings have been had that you, or a majority of you, have irregularly, and without authority or jurisdiction in the premises [state concisely what has been done, and in such manner as to show that the person making the affidavit has been affected]. And whereas it is alleged by said ..... that your proceedings therein have been irregular, without authority, and in violation of [naming the statute and the particular section alleged to be violated, and in what the violation consists; or if a violation of rules adopted by the board is relied upon, set out a copy of the rules].

And we being willing that your said proceedings in the premises, and appertaining thereto, should be certified and returned by you into our Supreme Court, before our justices thereof, at a term of said court to be held at ..... in ....., on the ..... day of ..... next, do command you that you certify and return into our Supreme Court, before our said justices thereof, at a term of said court to be held at the place and on the day last aforesaid, at the opening

<sup>69</sup> People, etc. v. Board of Delegates, etc., 14 Cal. 479.

<sup>70</sup> People v. Berne, 44 Barb. 467.

<sup>71</sup> Starkweather v. Seeley, 45 Barb. 164; Burnett v. Douglas County, 4 Oreg. 388; Road Co. v. Douglas County, 5 Id. 280.

<sup>72</sup> Colden v. Borts, 12 Wend. 234.

of the court on that day, all the proceedings concerning the said [removal from office, or other act complained of], and taken by and remaining before you, so that our said court may further act thereon, as of right and according to law ought to be done; and have you then and there this writ.

Witness, . . . . ., chief justice of our said Supreme Court, at . . . . . this . . . . . day of . . . . ., 18..

By the Court

. . . . ., Clerk.<sup>73</sup>

**§ 5370. Writ of certiorari to review acts of Superior Court.**

*Form No. 1202.*

[TITLE.]

The people of the state of California to the Superior Court of the county of . . . . .:

Whereas it manifestly appears to us by the affidavit of . . . . ., the party beneficially interested, that in a certain action pending before you, against . . . . ., at the suit of . . . . ., you, exercising judicial functions, have exceeded your jurisdiction, and that there is no appeal nor any other plain, speedy, and adequate remedy, and being, therefore, willing to be certified of the said action or proceeding:

We, therefore, command you, that you certify and send to our Supreme Court, at the courtroom thereof, in the city of . . . . . on the . . . . . day of . . . . ., A. D., 18.., annexed to the writ, a transcript of the record and proceedings in the action aforesaid, with all things touching the same, as fully and entirely as it remains before you, by whatsoever names the parties may be called therein, that the same may be reviewed by our Supreme Court, and that our Supreme Court may further cause to be done thereupon what it may appear of right ought to be done; and in the meantime we command and require the said Superior Court of the county of . . . . . to desist from further proceedings in the matter so to be reviewed, and that execution be stayed in said cause.

<sup>73</sup> The writ should be addressed to the board, and not to the members individually. *People v. Chalwell*, 6 Abb. Pr. 151. It should show that some person is aggrieved and recite his complaint. *Ex parte Mayor, etc.*, 23 Wend. 277. A copy of the order allowing the writ should be served with it, or the allowance should be indorsed on the writ. 19 Wend. 640.



Witness, . . . . ., chief justice of our Supreme Court, at  
 . . . . ., this . . . . . day of . . . . ., A. D., 18..

By the court.

[SEAL.]

. . . . .,

Clerk.

§ 5371. **Affidavit.** The application for the writ must be made on affidavit by the party beneficially interested.<sup>74</sup> When the application is made to the Supreme Court the affidavit should show a sufficient reason why it is not made to the District Court.<sup>75</sup> To justify the issuing of a writ of *certiorari* from the District Court, to review proceedings in an action which has passed to judgment in a County Court, on the ground that the latter court had no jurisdiction by reason of the excess of the amount in controversy, the affidavits by the applicant must state the amount of the judgment rendered. The question of jurisdiction depends upon the amount of the judgment, and not the amount prayed for in the complaint.<sup>76</sup> Opposing affidavits may be received.<sup>77</sup> The affidavit must state that the application is made in good faith, and not for the purpose of delay.<sup>78</sup>

§ 5372. **Discretion.** The granting or refusal of the writ is within the sound discretion of the court, and where invoked for the purpose of reviewing the acts and decision of special jurisdictions which are created by the statute, and do not proceed according to the course of the common law, does not issue *ex debito justitiae*, having due regard to public convenience, and the detriment which might result from interfering with their proceedings.<sup>79</sup>

<sup>74</sup> Cal. Code Civ. Pro., § 1069; see *Burr v. Board of Supervisors*, 96 Cal. 210; *Ashe v. Board, etc.*, 71 id. 236; *Champion v. Minnehaha County*, 5 Dak. 416. In proceedings by *certiorari* to review an order of the Superior Court, the court is the only necessary party respondent. *Baker v. Superior Court*, 71 Cal. 583.

<sup>75</sup> *Gallardo v. Hannah*, 49 Cal. 136.

<sup>76</sup> *Wratten v. Wilson*, 22 Cal. 465.

<sup>77</sup> *People ex rel. Onderdonk v. Supervisors*, 1 Hill, 195; *People v. First Judge of Columbia*, 2 id. 398; *Saratoga & Wash. R. R. Co. v. McCoy*, 5 How. Pr. 375.

<sup>78</sup> *Cunningham v. La Crosse Packet Co.*, 10 Minn. 299.

<sup>79</sup> *Keys v. Marin Co.*, 42 Cal. 255; see, also, *Hagar v. Sup. Ct. of Yolo Co.*, 47 id. 228; *Rutland v. Commissioners of Worcester*, 20 Pick. 79; *People ex rel. Church v. Supervisors, etc.*, 15 Wend. 206; *Susquehanna Bank v. Supervisors*, 25 N. Y. 312; *People v. Supervisors*, 43 Barb. 232; *Matter of Eightieth Street*, 17 Abb. Pr. 324;



§ 5373. **Issuance of writ.** Several writs of *certiorari* may be issued in one case.<sup>80</sup>

§ 5374. **Notice.** There is no provision of the statute requiring notice on the adverse party, on application for a procurement of a writ of *certiorari* to bring up the record and proceedings in the action. It is obvious, however, that he should be duly notified of the proceedings.<sup>81</sup>

§ 5375. **Particular cases.** Where officers make a void order which is *coram non judice*, it is properly to be canceled by *certiorari*.<sup>82</sup> If the decision of commissioners in highway cases is appealed from, *certiorari* lies to remove the proceedings into the Supreme Court.<sup>83</sup> But it does not lie to review acts of commissioners in laying out a road.<sup>84</sup> The order granting a *habeas corpus* may be reviewed on *certiorari*.<sup>85</sup> In cases of municipal assessments for improvements, *certiorari* will lie.<sup>86</sup> But not at the instance of an individual, for the laying of a tax or assessment which affects a considerable number of persons.<sup>87</sup>

Burgett v. Apperson, 52 Ark. 213; French v. Barre, 58 Vt. 567; Burnett v. Douglas County, 4 Oreg. 388. The writ will be refused where it appears that it can have no beneficial effect. Burr v. Board of Supervisors, 96 Cal. 210; State v. Rose, 4 N. Dak. 319; Water Power Co. v. Berkshire County, 112 Mass. 206; State v. Orrick, 106 Mo. 111.

<sup>80</sup> Matter of Woodbine Street, 17 Abb. Pr. 112.

<sup>81</sup> Pollock v. Cummings, 38 Cal. 685; Cal. Code Civ. Pro., § 1069.

<sup>82</sup> Starr v. Trustees, etc., 6 Wend. 563; People v. Judges, 24 id. 249; Wildy v. Washburn, 16 Johns. 49; Fitch v. Commissioners, 22 Wend. 132.

<sup>83</sup> Lawton v. Commissioners, 2 Cal. 179; Commissioners of Kinderhook v. Claw, 15 Johns. 537; Pearsall v. Commissioners, 17 Wend. 15; Pugsley v. Anderson, 3 id. 468.

<sup>84</sup> People *ex rel.* Woodward v. Covert, 1 Hill, 674. In what cases it lies in highway cases, see Baldwin v. City of Buffalo, 25 N. Y. 375; Deltrick v. Commissioners, 6 Ill. App. 70.

<sup>85</sup> People v. Mayer, 16 Barb. 362; Spencer v. Hilton, 10 Wend. 608.

<sup>86</sup> Le Roy v. Mayor of New York, 20 Johns. 430; Starr v. Trustees of Rochester, 6 Wend. 564; People v. City of Rochester, 21 Barb. 656; Elmendorf v. Mayor of New York, 25 Wend. 593; Betts v. City of Williamsburgh, 15 Barb. 255.

<sup>87</sup> *In re* Mount Morris Square, 2 Hill, 16; Case of Fifty-first Street, 3 Abb. Pr. 232. In case of a special statute, see Starr v. Trustees, etc., 6 Wend. 564; Le Roy v. The Mayor, etc., 20 Johns. 430; 8 Pick. 218; *In re* Mount Morris Square, 2 Hill, 14; People v. Mayor, etc., 5 Barb. 43; *Ex parte* Van Orden, 13 Blatchf. 166; People v. Mayor

§ 5376. **Petition for writ.** A petition for *certiorari* must state the amount of the judgment, what it was for, that it was rendered, and against whom.<sup>88</sup> A petition for *certiorari* will be dismissed which does not allege that the facts therein stated were proved, or does not give any reason why they were not proved.<sup>89</sup> Heirs may petition for a *certiorari*, to revise the order of a County Court, under which the homestead of the deceased was not legally disposed of.<sup>90</sup> When the petitioner for a *certiorari* was detained at home by violent sickness during the trial of his cause, and after judgment his counsel obtained an appeal upon condition of his giving security for the appeal, which he failed to do by reason of his detention at home, it was held that these facts were sufficient to rebut the idea of his having abandoned the right to appeal, and entitled him to a *certiorari*.<sup>91</sup>

§ 5377. **Principles of determination.** The necessary evidence to make out a fact essential to the jurisdiction of the officer will be assumed.<sup>92</sup>

§ 5378. **Proceedings.** A defendant in a criminal case can not take out a writ of *certiorari*, except by special allowance of the Supreme Court or a judge thereof, or by consent of the attorney-

of Brooklyn, 9 Barb. 535. In cases of ministerial officers, see *Matter of Bruni*, 1 Barb. 187. Of officer whose term has expired, to bring up his official proceedings for review, see *Bac. Abr.*, Cert. F; *Welsh v. Joy*, 13 Pick. 477; *The King v. Sheriff, etc.*, 4 East, 604; *People ex rel. Devlin v. Peabody*, 6 Abb. Pr. 228. As to turnpike assessors. *Broadhurst v. First Great Turnpike Co.*, 16 Johns. 8; or railroad appraisers. *Hill v. Mohawk & Hudson R. R. Co.*, 7 N. Y. 152.

<sup>88</sup> *Boyd v. Clark*, 21 Tex. 426.

<sup>89</sup> *Baldwin v. Hardin*, 21 Tex. 443. Sufficiency of petition. See *Sayers v. Superior Court*, 84 Cal. 642; *Cunningham v. Superior Court*, 60 id. 576; *Marsh v. Superior Court*, 88 id. 595; *Fuller v. Arnold*, 64 Ga. 600; *Rodman v. Clark*, 81 Mich. 466; *People v. Barker*, 66 Hun, 23.

<sup>90</sup> *Norris v. Duncan*, 21 Tex. 594.

<sup>91</sup> *Sharpe v. McElwee*, 8 Jones L. 115.

<sup>92</sup> *People v. Soper*, 7 N. Y. 428. As to testimony, see *Overseers of Plattekill v. Overseers of New Paltz*, 15 Johns. 305. As to error in summoning jurors, see *Farrington v. Morgan*, 20 Wend. 207. In proceedings in highways. *People, etc. v. Ferris*, 36 N. Y. 218. As to assessors in making their return to a *certiorari* sued out to renew a tax, see *State Line R. R. Co. v. Fredericks*, 48 Barb. 173.

general, but such writ may be sued out by the district attorney in behalf of the commonwealth without such allowance or consent.<sup>93</sup> A person not a party to summary proceedings can not sue out a *certiorari*.<sup>94</sup> The proceedings of the taxpayer in the District Court, contemplated by this statute, is a proceeding by *certiorari*, in the form and according to the course of that kind of suit, and the issuance of that writ is necessary to stay proceedings beyond the ten days, though probably no formal order of injunction is necessary.<sup>95</sup> A stay of proceedings may be required by the writ, or omitted in the sound discretion of the court; but unless a stay is enjoined by the writ, the power of the inferior court or officer is not suspended, or the proceedings stayed.<sup>96</sup>

§ 5379. **Return of writ.** When the writ is directed to a tribunal, the clerk, if there be one, must return the writ with the transcript required.<sup>97</sup> On petition for a *certiorari*, court must wait for a return in form from the court below.<sup>98</sup> In order to procure a reversal, it is necessary that the order should be brought up and made a part of the record.<sup>99</sup> A common-law *certiorari* brings up so much of the evidence as is necessary to present the questions of law upon which the relator relies to avoid the determination of the inferior court.<sup>100</sup> When a case

<sup>93</sup> Commonwealth v. Capp, 48 Penn. St. 53.

<sup>94</sup> Starkweather v. Seeley, 45 Barb. 164.

<sup>95</sup> California Northern R. R. Co. v. Butte Co., 18 Cal. 671; see State v. Clerk of Middletown, 24 N. J. L. 124.

<sup>96</sup> See Cal. Code Civ. Pro., §§ 1071, 1072.

<sup>97</sup> Id., § 1070; Fraser v. Freelon, 53 Cal. 644; Onesti v. Freelon, 61 id. 625. Where a writ of *certiorari* is directed to the judge of the Superior Court, directing him to certify to the Supreme Court a transcript of the record in a certain action, it is the duty of the judge to make a return thereto, and a return made by the clerk of the court is insufficient. State v. Sachs, 3 Wash. St. 496.

<sup>98</sup> Ex parte Dugan, 2 Wall. 134.

<sup>99</sup> People v. Highway Commissioners, 30 N. Y. 72.

<sup>100</sup> Baldwin v. City of Buffalo, 35 N. Y. 375; but see Railway Co. v. State Board, etc., 64 Mo. 294; Camden v. Bloch, 65 Ala. 238; Maxwell v. Perkins, 93 Penn. St. 255. The statute does not require the inferior tribunal to prepare a statement of the evidence to be annexed to the return. Central Pac. R. R. Co. v. Placer County, 34 Cal. 352; see Farmers', etc., Bank v. Board of Equalization, 97 id. 318. The return must not include the evidence. Road Co. v. Douglas County, 6 Oreg. 299. The facts found by the inferior tribunal

is brought from an inferior court or tribunal to the Supreme Court by *certiorari*, if all the facts upon which the court below acted are not in the record, the Supreme Court may require the court below to certify such facts.<sup>101</sup> The return is made by annexing to the writ a full transcript of the record and proceedings in the case properly certified.<sup>102</sup> If the return of the writ be defective, the court may order a further return to be made.<sup>103</sup> The writ may be made returnable, and a hearing be had thereon at any time.<sup>104</sup> The return of a finding of facts made by a county judge to a writ of *certiorari* constitutes a part of the record, though the finding is not made until the next term after the testimony is taken, and the order or judgment based on it is made.<sup>105</sup> A jury are no longer a legal body after their verdict is signed and they have reported; hence a return to a writ of *certiorari* signed by one of them afterwards is no return of the jury as a body or a tribunal.<sup>106</sup>

§ 5379a. **Conclusiveness of return.** Upon a writ of *certiorari* nothing can be inquired into except what appears of record in the inferior court or body, and upon the return no parol testimony is allowed to establish any issue made by the return to the allegations contained in the petition for the writ.<sup>107</sup> No more of the facts are required to be returned to the writ than are necessary to determine jurisdiction, and the return being deemed conclusive, no evidence, not included therein, will be

constitute the return upon which the court acts in determining whether such tribunal exceeded its jurisdiction, or exercised its functions erroneously, to the injury of the plaintiff in the writ. *Id.*; *Poppleton v. Yamhill*, 8 Oreg. 337; see *White v. Superior Court*, 110 Cal. 60; *Johnston v. Board of Supervisors*, 104 *id.* 390.

<sup>101</sup> *Blair v. Hamilton*, 32 Cal. 49.

<sup>102</sup> Cal. Code Civ. Pro., § 1071.

<sup>103</sup> *Id.*, § 1075; *State v. St. Louis*, 67 Mo. 113; *Warren v. Wilson*, 63 Ga. 372.

<sup>104</sup> Cal. Code Civ. Pro., § 1108.

<sup>105</sup> *Blair v. Hamilton*, 32 Cal. 49; see *O. P. R. R. Co. v. Board of Equalization*, *id.* 582.

<sup>106</sup> *People v. Highway Commissioners*, 30 N. Y. 72. For sufficiency of return in a case of garnishment, see *Gould v. Myer*, 36 Ala. 565. In summary proceedings. *Benjamin v. Benjamin*, 5 N. Y. 383. By officer after term expired. *Welch v. Joy*, 13 Pick. 477; *The King v. The Sheriff, etc.*, 4 East, 604; *Classon v. Shotwell*, 12 Johns. 31; *Seymour v. Webster*, 1 Cow. 168; *Harris v. Whitney*, 6 How. Pr. 175.

<sup>107</sup> *State v. Kemen*, 61 Wis. 494; *In re Dance*, 2 N. Dak. 184.

received and examined.<sup>108</sup> If the minutes of the court below do not correctly show the proceedings had, an application should be made in that court to correct the same.<sup>109</sup>

§ 5380. **What questions may be raised.** The office of a writ of *certiorari* when issued out of the Supreme Court, to review the proceedings and determinations of the inferior tribunals, extends unquestionably to the review of all questions of jurisdiction, power, and authority of the inferior tribunal to do the acts complained of, and all questions of regularity in the proceedings — that is, all questions whether the inferior tribunal has kept within the boundaries prescribed for it by the express terms of the statute law, or by well-settled principles of the common law.<sup>110</sup> It may determine whether there is any evidence, but not upon the weight and just force of evidence;<sup>111</sup> or whether the fact of jurisdiction is established.<sup>112</sup> They have a right to inquire into the principles upon which judges assessed damages in case of an assessment.<sup>113</sup>

<sup>108</sup> *State v. Board of Equalization*, 7 Nev. 87; *Alexander v. Archer*, 21 id. 22; see, also, *De Pedorena v. Superior Court*, 80 Cal. 144; *Farmers', etc., Bank v. Board of Equalization*, 97 id. 318; *Roe v. Superior Court*, 60 id. 93; *Simpson v. McBride*, 78 Ga. 297; *Railroad Co. v. Seymour*, 81 Mich. 378; *Smith v. Portland*, 25 Oreg. 297.

<sup>109</sup> *Hoffmann v. Superior Court*, 79 Cal. 475; and see *People v. Lohnas*, 54 Hun, 604.

<sup>110</sup> *Lynde v. Noble*, 20 Johns. 80; *Starr v. Trustees, etc.*, 6 Wend. 566; *Tallen v. Bigelow*, 10 id. 421; *Rathbun v. Sawyer*, 15 id. 452; *Nicholls v. Williams*, 8 Cow. 13, 16; *People v. Vermilyea*, 7 id. 108, 136, 137; *Birdsall v. Phillips*, 17 Wend. 464; *Simpson v. Rhinelanders*, 20 id. 103; *People v. Mayor, etc.*, 2 Hill, 9, 11, 398; *In re Mayor, etc.*, 6 Cow. 570; *Bonton v. President, etc.*, 2 Wend. 395; *Comstock v. Porter*, 5 id. 98; *People v. Van Alstyne*, 32 Barb. 131; *People v. Supervisors, etc.*, 43 id. 232; *Hill v. The Mohawk, etc., R. R. Co.*, 3 Seld. 152; *Chegary v. The Mayor, etc.*, 3 Kern. 223; S. C., 23 N. Y. 192, 222; S. C., 26 id. 163; *People ex rel. Citizens' Gaslight Co. v. Board of Assessors, etc.*, 39 id. 81; *People ex rel. Buffalo & State Line R. R. Co. v. Fredericks*, 48 Barb. 173; see, also, *People, etc. v. Board of Police*, 39 N. Y. 506; *Newton v. Leary*, 64 Wis. 190; *McCulley v. Cunningham*, 96 Ala. 583; *Poe v. Machine Works*, 24 W. Va. 517; § 11, *ante*.

<sup>111</sup> *People v. Overseers of Ontario*, 15 Barb. 286.

<sup>112</sup> *People, etc. v. Goodwin*, 5 N. Y. 568.

<sup>113</sup> *Stone v. Mayor of New York*, 25 Wend. 157; *Baldwin v. Oalkins*, 10 id. 166; but see *Matter of Mount Morris Square*, 2 Hill, 14. See further, on assessments, *Bouton v. President of Brooklyn* 2 Wend. 395; *Ex parte Mayor of Albany*, 23 id. 277; *Owners of Ground v.*

§ 5380a. **Dismissal or quashing of writ.** Although a writ of *certiorari* may have been issued, it may be dismissed without a hearing when, in the opinion of the court, it was improvidently issued.<sup>114</sup> The writ may be dismissed where the prosecutor had a remedy by appeal, but failed to avail himself of it.<sup>115</sup> It may be quashed for insufficiency of the affidavit or petition.<sup>116</sup> And application for the writ may be defeated by *laches* in suing it out.<sup>117</sup> Where dismissal of the writ appears not to be based upon discretion, the appellate court will examine the grounds thereof, and, if found insufficient, will reverse and remand for action on the merits, and an exercise of discretion.<sup>118</sup>

§ 5380b. **Writ of review — demurrer.** When a demurrer to a petition in the Supreme Court for a writ of review has been determined in favor of the petitioner, and the answer raises only the same question which was passed upon in considering the demurrer, it presents no material fact to be tried, and the petitioner is entitled to judgment upon the pleadings in his favor.<sup>119</sup>

Mayor of Albany, 15 *Id.* 374; *People v. City of Rochester*, 21 *Barb.* 666. As to taxation, see *Rex v. Inhabitants, etc.*, 2 *Stra.* 932; *Lawton v. Commissioners, etc.*, 2 *Cal.* 182; *Church v. Supervisors*, 15 *Wend.* 198. In summary proceedings, *Niblo v. Post*, 25 *Wend.* 280; following *Anderson v. Prindle*, 23 *Id.* 616; *Buck v. Binninger*, 3 *Barb.* 391.

<sup>114</sup> *Gregory v. Dixon*, 7 *Wash. St.* 27; and see *Spooner v. Seattle*, 6 *Id.* 370; *Phillips v. Welch*, 12 *Nev.* 158; *Cosby v. Probate Court*, 3 *Utah*, 51.

<sup>115</sup> *In re Henriques*, 5 *N. Mex.* 169.

<sup>116</sup> *Knox v. Carter*, 58 *Tenn.* 12; *Spinks v. Mathews*, 80 *Tex.* 373.

<sup>117</sup> *Kimple v. Superior Court*, 66 *Cal.* 136; *Smith v. Superior Court*, 97 *Id.* 348.

<sup>118</sup> *Champion v. Commissioners, etc.*, 5 *Dak.* 416.

<sup>119</sup> *Carpenter v. Superior Court*, 77 *Cal.* 291; see *Stewart v. Superior Court*, 101 *Id.* 594.

## CHAPTER II.

### HABEAS CORPUS.

§ 5381. **In general.** The writ of *habeas corpus* is that legal process which is employed for the summary vindication of the right of personal liberty when illegally restrained.<sup>1</sup> The writ of *habeas corpus*, when issued to inquire into the cause of an imprisonment, is in the nature of a writ of error, and when allowed and heard by an officer of the court, the officer is deemed a court, within the meaning of the act which forbids certain persons to be discharged before the expiration of the sentence, except upon a review by a court of superior jurisdiction to the magistrate making the commitment.<sup>2</sup>

§ 5382. **The right of personal liberty.** Personal liberty is defined to be the power of unrestrained locomotion.<sup>3</sup> It is the right to do all things which a person wants to do, when the doing of those things will not violate any principle of common justice. It is the right to pursue happiness in any way man may choose, so that he does not give others misery. It is the unrestrained power to do right, with all reasonable restraints against doing wrong. Personal liberty does not mean license to commit crimes, or to go forth and be the judge in one's own case, and impose the penalty and inflict the punishment of real or fancied wrongs, without restraint. In ordinary terms, it means that we, as members of society, owing duties to it and receiving benefits from it, will do unto others as we would they would do unto us. Governments are formed for the purpose of securing and protecting men in the employment of their natural rights, and they would fail of accomplishing that object if the powers to regulate or prescribe the mode in which such rights are to be exercised be not lodged in the law-making department.<sup>4</sup>

<sup>1</sup> Hurd on *Habeas Corpus*, 143.

<sup>2</sup> 3 BL. Com. 131, 132; *Alder v. Chip*, 2 Burr. 755, 756; *Ingersoll on Habeas Corpus*, 36; *In re Yates*, 4 Johns. 360; Bac. Abr., tit. *Habeas Corpus*, A; *Ex parte Watkins*, 3 Pet. 203; *Case of the Twelve Commitments*, 19 Abb. Pr. 394; *Matter of Miller*, 1 Daly, 512.

<sup>3</sup> Hurd on *Habeas Corpus*, 1.

<sup>4</sup> *Ex parte Smith*, 38 Cal. 702.



Hence this provision of the Constitution is not to be understood as putting life or liberty entirely beyond the reach of the government, if, for misconduct, the general welfare of the community demands its sacrifice or restraint; or as allowing every one to acquire property after his own unregulated manner, and according to his own uncontrolled will, but in such a manner and by such means as the general welfare of the community may require him to observe. While the exercise of these rights can not be denied to any one, it may be regulated.<sup>5</sup>

As the Legislature is not prohibited from all interference with the rights enumerated in the Constitution, such reasonable restraints as tend to keep man's passions in due bounds are not infringements upon his right of personal liberty. If it were so, then personal liberty would mean barbarism. These restraints are prescribed by the supreme power in the state, and a cheerful obedience to them is one of the chief evidences of an enlarged security for life, liberty, and property. Every act which may tend to impair the exercise of the natural right of persons, beyond what is needful for the general good, may be prohibited. But the instances are many, even in the history of our own country, when a citizen has been restrained of his personal liberty without due process of law, and this, too, when he has committed no wrong, or if he has, when he is being punished in an illegal manner. Hence the wisdom of our ancestors provided a means by which a person so restrained of his liberty contrary to law might in a speedy manner be freed. This means is the writ of *habeas corpus*, the privilege of which writ shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it.<sup>6</sup>

§ 5383. **Right of bail.** In nearly every state in the Union all offenses are bailable, except only such felonies as are punishable by death, and in those cases "the proof must be evident, or the presumption great," to deprive the party of the right of bail.<sup>7</sup> In some states the right to bail, where the proof is not thus evident, in capital cases, is not guaranteed by the Constitutions thereof, but even then the right is as fully secured by the decisions of their courts.<sup>8</sup> The varied and sometimes difficult ques-

<sup>5</sup> Id. 705.

<sup>6</sup> Const. of U. S., art. 1, § 9, subd. 2; Const. of Cal., art. 1, § 5.

<sup>7</sup> Hurd on *Habeas Corpus*, 434.

<sup>8</sup> See *Ex parte Taylor*, 5 Cow. 39; *Jones v. Kelly*, 17 Mass. 116; *Evans v. Foster*, 1 N. H. 374; *State v. Everett*, 1 Hill, 398, note; Hurd on *Habeas Corpus*, 437.



tions presented to the courts, when application for bail is made by a party charged with the commission of a felony, become matters of judicial discretion. No two cases are alike, and the judge necessarily stands between the liberty of the petitioner and the offended law. In capital cases, the fact as to whether the proof is evident or the presumption great may often cause a judge to doubt between two opinions. The discretion above referred to means a conscientious, a legal discretion. Under the benign influence of a modern civilization, the punishment imposed for the commission of the most heinous crimes is inflicted not so much to cause the subject pain as to avoid its repetition, to warn others against the committing of a like offense. Hence vindictive punishments and long imprisonments, except in rare and extreme cases, are unknown in American jurisprudence.

§ 5384. Petition for writ.

Form No. 1203.

<p>In the Matter of the Application of ..... for a Writ of <i>Habeas Corpus</i>.</p>
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To the Hon. ...., judge of the Superior Court of  
the state of ....., in and for the .....  
county of .....

The petition of ..... respectfully shows:

That ..... is unlawfully imprisoned, detained, confined, and restrained of his liberty by ....., at ....., in the ..... county of ....., in the state of .....

That the said imprisonment, detention, confinement, and restraint are illegal; and that the illegality thereof consists in this, to-wit [state what].

Wherefore, your petitioner prays that a writ of *habeas corpus* may be granted, directed to the said ....., commanding him to have the body of ..... before your honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor concerning him, together with the time and cause of ..... detention, and said writ; and that he may be restored to his liberty.

Dated on the ..... day of ....., 18..

[ORDINARY VERIFICATION.]

[SIGNATURE.]

§ 5385. **Application.** Application for a writ of *habeas corpus* is made by petition, and must specify: 1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties, if they are known, or describing them if they are not known; 2. If the imprisonment is alleged to be illegal, the petition must state in what the illegality consists; 3. The petition must be verified by the oath or affirmation of the party making the application. It must also be signed either by the party for whose relief it is intended, or by some person in his behalf.<sup>9</sup>

§ 5386. **By whom granted.** The writ may be granted by the Supreme Court, or any justice thereof, upon petition upon behalf of any person restrained of his liberty in this state. When so issued, it may be made returnable before the court, or any justice thereof, or before any District or County Court, or any judge thereof. It may be granted by a District Court or judge on behalf of any person restrained of his liberty within the judicial District, or by a County Court or judge within his county.<sup>10</sup> The Supreme Court is always open for issuing this writ.<sup>11</sup> Superior judges may at chambers grant the writ, or hear and dispose of it.<sup>12</sup> Where a writ of *habeas corpus* issued by the Supreme Court is made returnable before a judge of a District Court, his authority is the same as that of the Supreme Court would have been if the writ had been made returnable before it, and, therefore, his order was not in excess of his authority.<sup>13</sup>

§ 5387. **Fees.** No fee or compensation of any kind must be charged or received by any officer for duties performed or services rendered in proceedings upon *habeas corpus*.<sup>14</sup>

<sup>9</sup> Cal. Code Civ. Pro., § 1474. When the ground of the petition is, that the prisoner has been committed without reasonable or proper cause, it must set out what the evidence on the examination was in such form that perjury may be assigned on false allegations. *Ex parte* Walpole, 84 Cal. 584; *Ex parte* Buckley, 105 id. 123.

<sup>10</sup> Cal. Code Civ. Pro., § 1475.

<sup>11</sup> Id., § 48. The Supreme Court of Washington has original jurisdiction in *habeas corpus* to issue the writ or make the order *nisi* in all cases. *In re* Rafferty, 1 Wash. St. 382.

<sup>12</sup> Cal. Code Civ. Pro., § 176.

<sup>13</sup> *People v. Booker*, 51 Cal. 318; consult *Ex parte* Marks, 49 id. 680.

<sup>14</sup> Cal. Pol. Code, § 4333.

§ 5388. **To whom directed.** The writ must be directed to the person having custody of or restraining the person on whose behalf the application is made, and must command him to have the body of such person before the court or judge before whom the writ is returnable, at a time and place therein specified.<sup>15</sup> If the person to whom the writ is directed refuses to obey the same, the court or judge must, upon affidavit, issue an attachment for his apprehension, and he may be committed to jail until he makes due return to the writ or is otherwise discharged.<sup>16</sup>

§ 5389. **Return.** The person on whom the writ is served is required to produce the body of the person under his custody or restraint, according to the command of the writ, unless prevented by the sickness or infirmity of the person to be produced, which fact must be shown by affidavit, in which case the cause may proceed in his absence, or the hearing be adjourned until he can be produced.<sup>17</sup>

§ 5390. **Repeated applications.** The doctrine of *res adjudicata* does not apply to proceedings on *habeas corpus*, and the refusal to grant the writ is no bar to a second application.<sup>18</sup>

§ 5391. **Order granting writ.**

*Form No. 1204.*

[TITLE.]

On reading and filing the petition of ....., duly signed and verified by him, whereby it appears that he is illegally imprisoned and restrained of his liberty by ....., at the ....., in the ..... county of ....., in the state of ....., and stating wherein the illegality con-

<sup>15</sup> Cal. Penal Code, § 1477. As to delivery to the officer for service, see *Id.*, § 1478.

<sup>16</sup> *Id.*, § 1479.

<sup>17</sup> *Id.*, §§ 1481, 1482. The requisites of a return are found in the Penal Code, § 1480.

<sup>18</sup> *In re* Edward Ring, 28 Cal. 247; *In re* Perkins, 2 *id.* 424. See, under common-law rule, *Ex parte* Partington, 13 Mee. & W. 679; *In re* Parker, 5 *id.* 32; *The King v. Suddis*, 1 East, 306, 314; *Burdett v. Abbot*, 14 *id.* 91; *Watson's Case*, 9 Ad. & El. 731; *Ex parte* Kalne, 3 Blatchf. 1; compare *In re* Kalne, 14 How. (U. S.) 103; *Ex parte* Robinson, 6 McLean, 355. The Supreme Court of Washington will not take original jurisdiction of an application for a writ of *habeas corpus* after the denial of the writ in the same matter by a Superior Court. *In re* Graham, 7 Wash. St. 237.

sists, from which it appears to me that a writ of *habeas corpus* ought to issue:

It is ordered that a writ of *habeas corpus* issue out of and under the seal of the Superior Court of the state of . . . . ., in and for the . . . . . county of . . . . ., directed to the said . . . . ., commanding him to have the body of the said . . . . . before me, in the court-room of the said court, on the . . . . . day of . . . . ., 18.., at . . . . . o'clock A. M. of that day, to do and receive what shall then and there be considered concerning the said . . . . ., together with the time and cause of his detention, and that he have then and there the said writ.

Dated on the . . . . . day of . . . . ., 18..

P. Q.,

Judge . . . . .

**§ 5392. Proceedings and practice — bail.** When any person is imprisoned or detained in custody on any criminal charge for want of bail, he is entitled to a writ of *habeas corpus*, for the purpose of giving bail, upon averring that fact in his petition, without alleging that he was illegally confined.<sup>19</sup> On the hearing the judge may, if the offense is bailable, take an undertaking, as in other cases, and file the same in the proper court.<sup>20</sup> Admission to bail is the order of a competent court or magistrate, that the defendant be discharged from actual custody upon bail.<sup>21</sup>

**§ 5393. Custody.** A person convicted of a crime against the United States by a federal court, and confined in the prison of the state, with the consent of the state, is in the custody of the federal authorities.<sup>22</sup>

<sup>19</sup> Cal. Penal Code, § 1490.

<sup>20</sup> Id., § 1491.

<sup>21</sup> Id., § 1268. If the offense charged is punishable with death, see Id., § 1271. Pending an appeal, in other cases, after conviction, see Id., §§ 1272, 1273, 1274; *Ex parte Voll*, 41 Cal. 29. When the defendant has been held to answer after examination, see Cal. Penal Code, § 1277. Form of undertaking. Id., § 1278. Qualification of bail. Id., §§ 1279-1281. Upon indictment before conviction, see Id., §§ 1284-1287; *Ex parte McLaughlin*, 41 Cal. 212; 10 Am. Rep. 272. Deposit instead of bail. Cal. Penal Code, § 1295. General principles touching discharge of person charged with a criminal offense. Id., § 1489.

<sup>22</sup> *Ex parte Le Bur*, 49 Cal. 159.

§ 5394. **Defects of form.** No writ of *habeas corpus* can be disobeyed for defect of form, if it sufficiently appear therefrom in whose custody or under whose restraint the party imprisoned or restrained is, the officer or person detaining him, and the court or judge before whom he is to be brought.<sup>23</sup>

§ 5395. **Discharge.** When a party is "in confinement for acts done in pursuance of a law of the United States, and under process from a judge of the same," he will be discharged on *habeas corpus*.<sup>24</sup> So when the indictment charges an offense not known to the law.<sup>25</sup> So where five females are brought before the court on a return to a writ of *habeas corpus*, and the person in whose custody they are neither shows nor claims any legal right to detain them, they will be discharged.<sup>26</sup> A prisoner committed on final process will not be discharged on *habeas corpus* by reason of defects in the judgment, unless the judgment is absolutely void.<sup>27</sup> If the warrant of commitment be informal or insufficient, the court, upon *habeas corpus*, will discharge the prisoner; but if sufficient cause appear, will recommit him in proper form.<sup>28</sup> Where the prisoner is not discharged on a writ of *habeas corpus*, it is the duty of the court to remand him.<sup>29</sup>

<sup>23</sup> Cal. Penal Code, § 1495.

<sup>24</sup> *Ex parte Jenkins*, 2 Wall. Jun. C. C. 521; 2 Am. Law Reg. 114.

<sup>25</sup> *In re Corryell*, 22 Cal. 178.

<sup>26</sup> *Ex parte Queen of the Bay*, 1 Cal. 157.

<sup>27</sup> *People v. Smith*, 1 Cal. 9. If the judgment be void the prisoner will be discharged. *Ex parte Kearney*, 55 Cal. 212; *Ex parte Mirande*, 73 id. 365. He will be discharged when the facts charged and proved do not constitute a public offense. *Ex parte McNulty*, 77 Cal. 164; 11 Am. St. Rep. 257; *Ex parte Maler*, 103 Cal. 476; 42 Am. St. Rep. 129; *Ex parte Prince*, 27 Fla. 196; 26 Am. St. Rep. 67. So, a defendant in a civil action held in custody under an order of arrest, based upon an insufficient affidavit, will be discharged. *In re Vinch*, 86 Cal. 70. So of a person subjected to punishment for violation of an unconstitutional municipal ordinance. *Ex parte Keeney*, 84 Cal. 304. So of a person unreasonably detained as a witness. *Ex parte Dressler*, 67 Cal. 257. And a person denied a "speedy trial" as guaranteed by the federal Constitution is entitled to discharge on *habeas corpus*. *United States v. Fox*, 3 Mont. 512; compare *State v. Conrow*, 13 id. 554; *Benton v. Commonwealth*, 90 Va. 333.

<sup>28</sup> *Ex parte Bennet*, 2 Cranch C. C. 612; see, also, *Ex parte Branigan*, 19 Cal. 133; *Ex parte Milburn*, 9 Pet. 704.

<sup>29</sup> *People ex rel. Crouse v. Cowles*, 4 Keyes, 38. Where the evidence produced upon the examination shows that the offense charged has been committed, and it can not be said that it was in-

§ 5396. **Hearing on habeas corpus.** The hearing should be had immediately upon the return of the writ;<sup>30</sup> but may be adjourned under certain circumstances.<sup>31</sup> The party brought before the court or judge, on the return of the writ, may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful, or that he is entitled to his discharge. The proofs adduced on either side must be heard, and the attendance of witnesses may be compelled by subpoena and attachment.<sup>32</sup> An inquiry may be made outside the record, to ascertain whether in fact the confinement is on account of acts done in pursuance of a law of the United States, and under process from a judge of the same.<sup>33</sup> The functions of the writ, where the party appealing to its aid is in custody under process, do not extend beyond an inquiry into the jurisdiction of the court by which it was issued, and the validity of the process upon its face.<sup>34</sup> The court may proceed to inquire whether the indictment charges any offense known to the law.<sup>35</sup> But it is not competent to retry the issues of fact, or to review the proceedings of a legal trial.<sup>36</sup> Under the writ of *habeas corpus* it is not competent to determine whether or not the order of the court upon which the process was founded is or is not erroneous.<sup>37</sup> The remedy in such case is by *certiorari*.<sup>38</sup> The court has only to sufficient to warrant the committing magistrate in holding the petitioner to answer, he will be remanded. *Ex parte* Buckley, 105 Cal. 123.

<sup>30</sup> Cal. Penal Code, § 1483.

<sup>31</sup> *Id.*, § 1482; see, also, *Ex parte* Gibson, 31 Cal. 623; 91 Am. Dec. 546; *Ex parte* Ring, 28 Cal. 247.

<sup>32</sup> See *Id.*, § 1484.

<sup>33</sup> *Ex parte* Jenkins, 1 Phil. 168; S. C., 2 Wall. jun. C. O. 521; 2 Am. Law Reg. 144.

<sup>34</sup> *Ex parte* McCullough, 35 Cal. 97; *Ex parte* Ah Men, 77 *id.* 198; 11 Am. St. Rep. 263; *Ex parte* Long, 114 Cal. 159.

<sup>35</sup> *In re* Corryell, 22 Cal. 178.

<sup>36</sup> *Ex parte* Bird, 19 Cal. 130; *Ex parte* Cottrell, 59 *id.* 420; *Ex parte* Noble, 96 *id.* 362.

<sup>37</sup> *Ex parte* McCullough, 35 Cal. 97; *Ex parte* Granice, 51 *id.* 375; see, also, *State v. Kinmore*, 54 Minn. 135; 40 Am. St. Rep. 305; *Ex parte* Mitchell, 104 Mo. 121; 24 Am. St. Rep. 324. Only jurisdictional defects are available on *habeas corpus*. *In re* Morris, 39 Kan. 28; 7 Am. St. Rep. 512; *In re* Permstick, 3 Wash. St. 672; 28 Am. St. Rep. 90.

<sup>38</sup> *Matter of* Place, 34 How. Pr. 259.

inquire whether a warrant of commitment states a sufficient probable cause to believe that the person charged has committed the offense.<sup>39</sup> *Habeas corpus* is the proper remedy for every unlawful imprisonment, both in civil and criminal cases; but an imprisonment is not unlawful, in the sense of this rule, merely because the process or order under which the party is held has been irregularly issued, or is erroneous.<sup>40</sup>

§ 5397. **Jurisdiction — state courts.** The writ of *habeas corpus* may be issued and heard by the Supreme Court or any justice thereof, by a Superior Court or any judge thereof.<sup>41</sup> It may be issued in term or vacation, and be heard before the court or a judge at chambers.<sup>42</sup> So in case of a party arrested as a fugitive from justice.<sup>43</sup> But they have no power to control the executive discretion in such cases. Yet that discretion may be inquired into in every case involving the liberty of the citizen.<sup>44</sup> Its allowance in term-time by the Supreme Court of California is in the discretion of the court.<sup>45</sup> The Supreme Court may exercise its appellate jurisdiction by means of this writ.<sup>46</sup> But by the amendment to the Constitution, it has original jurisdiction in the issuance of the writ.<sup>47</sup>

§ 5398. **Jurisdiction, conflict of.** Where a person is properly in custody under state authority, the United States Circuit Court has no authority to take the accused by *habeas corpus* from such authority;<sup>48</sup> nor has a state court authority to remove a defendant from the custody of a court of the United States.<sup>49</sup>

<sup>39</sup> *United States v. Johns*, 4 Dall. 412; and see *Ex parte Sternes*, 82 Cal. 245; *Ex parte Walpole*, 85 id. 362; *Ex parte Becker*, 86 id. 402; *Ex parte Palmer*, id. 631.

<sup>40</sup> *Ex parte McCullough*, 35 Cal. 97.

<sup>41</sup> See Cal. Penal Code, § 1475.

<sup>42</sup> See Id., § 1483, and Cal. Code Civ. Pro., §§ 48, 76, 166.

<sup>43</sup> *In the Matter of Manchester*, 5 Cal. 237.

<sup>44</sup> Id.

<sup>45</sup> *Ex parte Ellis*, 11 Cal. 222.

<sup>46</sup> *People v. Turner*, 1 Cal. 143; 52 Am. Dec. 295.

<sup>47</sup> *Tyler v. Houghton*, 25 Cal. 26. As to the jurisdiction of state courts in the issuance of this writ, consult "Jurisdiction," *ante*, §§ 27-50.

<sup>48</sup> *United States v. Rector*, 5 McLean, 174; see, also, *Ableman v. Booth*, 21 How. (U. S.) 506; *Ex parte Dorr*, 3 id. 103; *Ex parte Skiles*, 50 Fed. Rep. 524; *Ex parte Ulrich*, 43 id. 661.

<sup>49</sup> *United States v. Rector*, 5 McLean, 174; *Tarble's Case*, 13 Wall. 397; *Ableman v. Booth*, 21 How. 506; see, also, Cal. Penal Code, § 1486; *Ex parte Le Bur*, 49 Cal. 159.



So in extradition cases where a warrant has been issued by the secretary of state, and is in the hands of the United States marshal;<sup>50</sup> so also in cases of enlistment.<sup>51</sup> It can not inquire into the validity of an enlistment in the case of desertion;<sup>52</sup> or where the prisoner is awaiting a trial before a court-martial.<sup>53</sup>

§ 5399. **Practice.** The proceedings on a writ of *habeas corpus* in the federal courts are governed by the common law of England as it stood at the adoption of the Constitution, subject to such alterations as Congress shall see fit to prescribe, and not by the state statutes.<sup>54</sup> So in cases of aliens.<sup>55</sup> A petitioner for a writ of *habeas corpus* is not entitled to a jury to try issues of fact.<sup>56</sup> Upon a return of *habeas corpus* in a case of arrest upon suspicion and without a warrant, proof must be given to show the suspicion to be well founded.<sup>57</sup>

§ 5400. **Rearrest.** No person who has been discharged by order of the court or judge upon *habeas corpus* can be again imprisoned, restrained, or kept in custody for the same cause, except in the following cases: 1. If he has been discharged from custody on a criminal charge, and is afterwards committed for the same offense by legal order or process; 2. If, after a discharge for defect of proof, or for any defect of the process, warrant, or commitment in a criminal case, the prisoner is again

<sup>50</sup> In the Matter of Veremaltre, 9 N. Y. Leg. Obs. 137; 6 Op-Att'y-Gen. 103, 713. See, as to the power of United States courts in such cases, *Ex parte Smith*, 3 McLean, 121; *In re Kaine*, 10 N. Y. Leg. Obs. 257; S. C., 14 How. (U. S.) 103; *Robb v. Connolly*, 11 U. S. 624, overruling *Ex parte Robb*, 1 West Coast Rep. 439.

<sup>51</sup> Matter of O'Connor, 48 Barb. 258; S. C., 3 Abb. Pr. (N. S.) 137; *Reilly's Case*, 2 id. 334; *People v. Gaul*, 44 Barb. 98; Matter of Martin, 45 id. 142. As to issuance of writ in cases of enlisted soldiers, and of the authority of state courts in the issuance of the writ of *habeas corpus* in such cases, consult Matter of Barrett, 42 Barb. 479, Matter of Graham, 8 Jones L. 416; Matter of Bryan, 1 Wins. (N. C.) No. 1; Matter of Rosenan, id. 443. Issuance of writ in favor of Chinese persons. See *In re Chin Yuen Sing*, 65 Fed. Rep. 572; *United States v. Chung Shee*, 71 id. 277; affirmed, 76 id. 951.

<sup>52</sup> See above cases; and see *Ex parte Anderson*, 16 Iowa, 595.

<sup>53</sup> Matter of Beswick, 25 How. Pr. 159.

<sup>54</sup> *Ex parte Watkins*, 3 Pet. 193; *Ex parte Kaine*, 3 Blatchf. 1.

<sup>55</sup> Matter of Barry, 7 Law Rep. 374.

<sup>56</sup> *Baker v. Gordon*, 23 Ind. 204.

<sup>57</sup> 2 Inst. 52; *In re Henry*, 29 How. Pr. 183.



arrested, on sufficient proof, and committed by legal process for the same offense.<sup>58</sup>

§ 5401. *Refusal to grant, etc.* If any judge, after a proper application is made, refuses to grant an order for a writ of *habeas corpus*, or if the officer or person to whom such writ may be directed refuses obedience to the command thereof, he shall forfeit and pay to the person aggrieved a sum not exceeding five thousand dollars, to be recovered by action in any court of competent jurisdiction.<sup>59</sup>

§ 5402. *Remanded.* The court or judge, if the time during which such party may be legally detained in custody has not expired, must remand such party, if it appears that he is detained in custody: 1. By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or 2. By virtue of the final judgment or decree of any competent court of criminal jurisdiction, or of any process issued upon such judgment or decree.<sup>60</sup> Where a commitment under a charge for murder was insufficient, because it failed to state the name of the person alleged to have been murdered, or that the name of such person was unknown, it was held that these defects did not entitle the petitioner to be discharged.<sup>61</sup>

§ 5403. *Return of writ.* Upon a return to a writ of *habeas corpus*, it is proper for the court to look into the depositions taken before the committing magistrate, in order to ascertain whether there is probable cause to suppose that a felony has been committed by the prisoner.<sup>62</sup> A return "that the person alleged to be detained was not within the control and custody of the party to whom the writ was directed, and that such per-

<sup>58</sup> Cal. Penal Code, § 1496; see *In re Crow*, 60 Wis. 349; *Ex parte Jilz*, 64 Mo. 205; *United States v. Chung Shee*, 76 Fed. Rep. 951.

<sup>59</sup> Cal. Penal Code, § 1505.

<sup>60</sup> *Id.*, § 1486.

<sup>61</sup> *Ex parte Bull*, 42 Cal. 199; see, also, *People v. Smith*, 1 *id.* 9; *Ex parte Bird*, 19 *id.* 131; *Ex parte Gibson*, 31 *id.* 623; 91 Am. Dec. 546; *Ex parte Ring*, 28 Cal. 247; *Ex parte Murray*, 43 *id.* 455; see, also, Cal. Penal Code, §§ 1492-1494. Informality in the commitment will not justify a discharge on *habeas corpus* when it is in the power of the petitioner for the writ to produce the record, and he fails to do so. *Fleming v. Bills*, 3 Oreg. 286.

<sup>62</sup> *People v. Smith*, 1 Cal. 9.

son was beyond the jurisdiction of the court, was held evasive and insufficient where such person had been removed in anticipation of the issuance of the writ.<sup>63</sup> Attachment for not returning is not issued until three days after service of the writ.<sup>64</sup> In Nevada, the warden of the state prison may show that he holds the prisoner not only by the virtue of a commitment, but also under sentence of the court.<sup>65</sup>

§ 5404. **Warrant.** Where it appears that any one is illegally held in custody, and that there is reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ of *habeas corpus* directed to the sheriff, coroner, or constable of the county, can be enforced, a warrant may be issued reciting the facts, and commanding him to take the person thus held in custody, confinement, or restraint, and forthwith bring him before such court or judge, to be dealt with according to law.<sup>66</sup>

§ 5405. **Writ—form of.** The writ must be issued by the clerk, and bear the seal of the court.<sup>67</sup> It must be returned before the judge (when issued by a judge) at the county seat, and there be heard and determined.<sup>68</sup> It may be issued and served on any day, at any time.<sup>69</sup>

§ 5406. **Who may issue writ.** The courts of the United States are empowered to issue the writ of *habeas corpus*.<sup>70</sup> Either of the justices of the Supreme Court of the United States, as well as a judge of any United States District or Circuit Court, may issue the writ.<sup>71</sup> In cases removed from state courts against

<sup>63</sup> United States v. Davis, 5 Cranch C. C. 622.

<sup>64</sup> United States v. Bollman, 1 Cranch C. C. 373.

<sup>65</sup> *Ex parte Salge*, 1 Nev. 449. It is an unanswerable return to a writ of *habeas corpus* that the court had jurisdiction in which the action was pending, and out of which the writ of arrest was issued, and was competent to correct any error or abuse of its powers, or to set it aside if erroneously issued. *Barton v. Saunders*, 16 Oreg. 51; 8 Am. St. Rep. 261. See, as to sufficiency of return, *Richards v. Collins*, 45 N. J. Eq. 283; 14 Am. St. Rep. 726; *In re Klein*, 39 N. Y. St. Rep. 873.

<sup>66</sup> Cal. Penal Code, § 1497.

<sup>67</sup> *Id.*, § 1503.

<sup>68</sup> *Id.*, § 1504.

<sup>69</sup> *Id.*, § 1502.

<sup>70</sup> U. S. R. S., § 751.

<sup>71</sup> *Id.*, § 752.

a person denied civil rights, and such person is in actual custody under process issued by the state court, a writ of *habeas corpus cum causa* must be issued by the clerk and delivered to the marshal.<sup>72</sup>

§ 5407. Writ of habeas corpus.

Form No. 1205.

[TITLE.]

[VENUE.]

The people of the state of California, to A. B., greeting:

We command you, that you have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said C. D. shall be called or charged, before G. H., judge of the Superior Court of the state of California, in and for the county of . . . . ., at the courtroom of the said court, in and for the city and county of San Francisco, on the . . . . . day of . . . . ., 18.., at . . . . . o'clock in the . . . . . noon of that day, to do and receive what shall then and there be considered concerning the said C. D. And have you then and there this writ.

Witness, Hon. . . . ., judge of the said court, at the courtroom thereof, in the city and county of San Francisco. this . . . . . day of . . . . ., 18..

Attest, my hand and the seal of the said court, the day and year last above written.

K. L., Clerk.

By O. P., Deputy Clerk.

<sup>72</sup> Id., § 642. In cases against revenue officers, and officers acting under registration laws, see Id., § 643. For proceedings generally in *habeas corpus* cases in the United States courts, see Id., §§ 751 to 766. That territorial courts may grant. See Id., § 1912. For various questions relating to this writ, consult *Ex parte* Smith, 3 McLean. 121; *Matter of* Keeler, Hempst. 300; *Ex parte* Des Rochers, 1 McAll 68; *United States v. Hamilton*, 3 Dall. 17; *Ex parte* Burford, 3 Oranch. 448; *Ex parte* Bollman, 4 Id. 75; *Ex parte* Watkins, 7 Pet. 568; *Ex parte* Kearney, 7 Wheat. 38; *Ex parte* Milburn, 9 Pet. 704; *Matter of* Metzger, 5 How. (U. S.) 176; *Ex parte* Hung Hang, 108 U. S. 552; *Ex parte* Clarke, 100 Id. 399; *Wales v. Whitney*, 114 Id. 564; *Benson v. McMahon*, 127 Id. 457; *Ex parte* Cuddy, 131 Id. 280. As to power of Circuit Courts, see *Ex parte* Milligan, 4 Wall. 3; *Ex parte* Smith, 3 McLean, 121. Of justice in vacation. See *Matter of* Kaine, 14 How. (U. S.) 103; *Ex parte* Barnes, Sprague, 133.

§ 5408. **Issuance of writ.** The writ should not issue to run out of the county, unless for good cause shown, as the absence, refusal, or disability of the judge to act, or other reason, showing that the object and reason of the law requires its issuance.<sup>73</sup> In such case, resort may be had to officers out of the county.<sup>74</sup> Though the writ is a writ of right, it is not granted, of course, but upon probable cause shown.<sup>75</sup> The act of issuing the writ is purely ministerial, and in no sense judicial.<sup>76</sup> A writ will not be granted if it appears from the application, *prima facie*, that there is not sufficient ground for the discharge of the party imprisoned.<sup>77</sup>

<sup>73</sup> *Ex parte Ellis*, 11 Cal. 222.

<sup>74</sup> *Id.*

<sup>75</sup> *United States v. Lawrence*, 4 Cranch O. O. 518; *Matter of Keeler*, Hempst. 307; *Ex parte Vollandigham*, Trial of Vollandigham, 259; *Ex parte Davis*, 4 Law Rep. (N. S.) 301; and see § 5397, *ante*; *Ex parte Murray*, 66 Fed. Rep. 297; *Ex parte Terry*, 128 U. S. 301. As to when issuance will be refused, see *Ex parte Kaine*, 3 Pet. 193; *Sim's Case*, 7 Cush. 285; Hurd on *Habeas Corpus*, 223; *Ex parte Vollandigham*, Trial of Vollandigham, 259. That the allowance or refusal is matter of law and not of discretion. See *Ex parte Milligan*, 4 Wall. 3.

<sup>76</sup> *People v. Nash*, 5 Park. Cr. 473; *Nash v. People*, 36 N. Y. 607; *Matter of Nash*, 16 Abb. Pr. 281; but to the contrary is *People ex rel. Ryan v. Russell*, 1 Abb. Pr. (N. S.) 230.

<sup>77</sup> *In re Grozier*, 16 Wis. 423; and see § 5395, *ante*.

## CHAPTER III.

### MANDAMUS.

§ 5409. **In general.** The writ of *mandamus* may be denominated the writ of mandate.<sup>1</sup> It may be issued by any court except a Justice's or Police Court, to an inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person.<sup>2</sup> It is now regarded, not as a prerogative writ, but in the nature of an action by the person in whose favor the writ is granted, for the enforcement of a right in cases where the law affords him no other adequate means of redress.<sup>3</sup> It is used merely to compel action, and coerce the performance of a pre-existing duty, where it was the plain duty of the respondent to act without its agency.<sup>4</sup> Where the legal right is doubtful, or where the performance of the duty rests in discretion, a writ of *mandamus* can not rightfully issue.<sup>5</sup> The writ is frequently granted where it can only determine one

<sup>1</sup> Cal. Code Civ. Pro., § 1084.

<sup>2</sup> Id., § 1085. A writ of mandate issues only to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. *Peck v. Supervisors*, 90 Cal. 384; *Priet v. Reis*, 93 id. 85. And does not lie to command a person to perform an act beyond that enjoined by law upon him as a duty pertaining to his office or position. *Davis v. Porter*, 66 Cal. 658; see also, *Bright v. Farmers', etc., Co.*, 3 Col. App. 170.

<sup>3</sup> *Arbury v. Beavers*, 6 Tex. 457. The writ lies to a great extent within the sound discretion of the court where the application is made. *Wiedwald v. Dodson*, 95 Cal. 450; *Ball v. Lapplus*, 3 Oreg. 55; *Territory v. Potts*, 3 Mont. 364; *People v. Board of Canvassers*, 129 N. Y. 360; *Tennant v. Crocker*, 85 Mich. 328; *Territory v. Wallace*, 1 N. Dak. 85.

<sup>4</sup> *People v. Gilmer*, 5 Gilm. 242; *People v. Hatch*, 33 Ill. 140.

<sup>5</sup> *State v. Supervisors*, 2 Chand. 250. But it will issue to compel the exercise of discretion. *Jacobs v. Board of Supervisors*, 100 Cal. 121; *People v. District Court*, 14 Col. 396.

step in the progress of inquiry, and when it can not finally settle or determine the controversy, as where canvassers of votes may be compelled to canvass the votes cast at an election, and return the result, though it may be necessary to resort to other proceedings to determine the ultimate questions of right, and to procure admission to the office.<sup>6</sup> There must be an actual default or omission of duty before the writ can be granted, and this must be made to appear by the relator. An omission of duty can not be anticipated. Threats, or predetermination not to discharge the duty, are not sufficient, if the time for performing the duty has not expired.<sup>7</sup> A demand and refusal are not necessary, however, where the duties are of a public nature, and affect the public at large, but where an individual claims the immediate and personal benefit of the act or duty, a demand and refusal are held necessary.<sup>8</sup>

The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law.<sup>9</sup> By the "ordinary course of law" is not meant a common-law remedy only, but it includes all special or particular remedies provided by statute.<sup>10</sup> So where another adequate remedy has been lost by neglect, or delay, the writ will not be granted.<sup>11</sup> Though other remedies exist, if they are inadequate to afford the particular relief to which the party is entitled, the writ will issue.<sup>12</sup> In one case the writ was sought to compel the sheriff to execute a writ of possession. The court said: "It is true, the relator might sue defendant on his bond for the damages resulting from the nonperformance of his duty, but the possession of the property which has been adjudged to him can only be obtained by the present process, and is the only adequate remedy."<sup>13</sup> So

<sup>6</sup> *State v. County Judge of Marshall*, 7 Iowa, 186.

<sup>7</sup> *Commissioners, etc. v. County Commissioners*, 20 Md. 449; *State v. Carney*, 3 Kan. 88.

<sup>8</sup> *Oroville & V. R. R. Co. v. Supervisors of Plumas Co.*, 37 Cal. 354.

<sup>9</sup> Cal. Code Civ. Pro., § 1086.

<sup>10</sup> *State v. Supervisors, etc.*, 29 Wis. 79.

<sup>11</sup> *Id.* The existence or nonexistence of an adequate remedy at law, under the ordinary forms of legal procedure, is the test whether or not the writ shall issue. *Durham v. Mining Co.*, 9 Oreg. 41; *Slemmons v. Thompson*, 23 *id.* 225; *Wood v. Strother*, 76 Cal. 545; 9 Am. St. Rep. 249; *Tobey v. Hakes*, 54 Conn. 274; 1 Am. St. Rep. 114; *Collet v. Allison*, 1 Okl. 42.

<sup>12</sup> See *Fremont v. Crippen*, 10 Cal. 215.

<sup>13</sup> *Id.*; see, also, *Babcock v. Goodrich*, 47 Cal. 488.

it is said the existence of equitable remedies does not affect the jurisdiction of courts of law to grant the writ of *mandamus*, although their existence may control their discretion in the matter.<sup>14</sup> It is well settled that the exercise of discretion can not be controlled or directed by *mandamus*. A judicial officer may be compelled to act, but the judgment or decision which he shall reach can not be controlled. It is only where the act to be done, or the duty to be performed, is of a peremptory character, as distinguished from those which are discretionary, that this remedy will be granted. It issues to the judges of inferior courts wherever justice has been improperly delayed.<sup>15</sup> It may compel action, but can not be used to correct the errors of an inferior court;<sup>16</sup> nor to restrain the performance of duties.<sup>17</sup>

§ 5410. **County officers.** Where the commissioners of a county have authority by statute to issue bonds, and are required to levy a tax to pay the interest coupons as they become due, and having issued such bonds, they neglect or refuse to assess the tax or pay the interest, a writ of *mandamus* is the proper legal remedy;<sup>18</sup> or to compel county commissioners to impanel a new jury to determine the location of a highway in a statutory case;<sup>19</sup> or to compel county board of supervisors to subscribe to capital stock of a corporation where they are directed so to do by the statute;<sup>20</sup> but not to compel county commissioners to remove the county seat.<sup>21</sup> It will be granted to compel an assessor to assess for taxation property liable to be taxed, and which he neglects or

<sup>14</sup> See *People v. Mayor*, 10 Wend. 395. The existence of an equitable remedy does not deprive a party of the legal remedy of *mandamus*. *Eby v. Board of Trustees*, 87 Cal. 166.

<sup>15</sup> *Ex parte Crane*, 5 Pet. 190.

<sup>16</sup> *State ex rel. Treadway v. Wright*, 4 Nev. 119. It is not the office of the writ to review judicial errors, and it will not lie to control the judgment of an officer or tribunal having discretionary or judicial functions. *Jacobs v. Board of Supervisors*, 100 Cal. 121; *People v. Superior Court*, 114 id. 466; *People v. Graham*, 16 Col. 347; *Greenwood, etc., Land Co. v. Boutt*, 17 id. 156.

<sup>17</sup> *Terry v. Stauffer*, 17 La. Ann. 306.

<sup>18</sup> *Knox v. Aspinwall*, 24 How. (U. S.) 376; *Robinson v. Supervisors*, 43 Cal. 353; see, also, *People v. Supervisors*, 50 id. 568; *Rose v. County Commissioners*, 50 Me. 243.

<sup>19</sup> *Mendon v. Worcester*, 10 Pick. 236.

<sup>20</sup> *Napa Valley R. R. Co. v. Napa County*, 30 Cal. 435.

<sup>21</sup> *Condit v. Board of Commissioners*, 25 Ind. 422.

refuses to assess;<sup>22</sup> or to compel assessors to correct an erroneous assessment;<sup>23</sup> or to compel a tax collector to execute and deliver to a person, paying his taxes in the coin therein designated, a receipt for the same;<sup>24</sup> on behalf of one illegally assessed.<sup>25</sup> A *mandamus* will not lie against a county treasurer to compel him to pay interest due on county bonds.<sup>26</sup> But it will lie to compel a county auditor to pay a county debt.<sup>27</sup>

§ 5411. **Governor of state.** *Mandamus* will issue to the governor in certain cases.<sup>28</sup> A writ of mandate will be issued to compel the governor to sign a patent, unless the law has vested him with discretionary power in that respect;<sup>29</sup> so as to land embraced in a sixteenth and thirty-sixth sections, not surveyed by the United States.<sup>30</sup> When a ministerial duty affecting a private right is specially devolved on the governor by law, which Legislature might have devolved on any other state officer, he may be compelled to perform the same by a writ of mandate.<sup>31</sup>

<sup>22</sup> *People v. Shearer*, 30 Cal. 645; *Gorgas v. Blackburn*, 14 Ohio, 252; but see *Tillson v. Commissioners, etc.*, 19 id. 415; *Hyatt v. Allen*, 54 id. 353.

<sup>23</sup> *People v. Olmstead*, 45 Barb. 644.

<sup>24</sup> *Perry v. Washburn*, 20 Cal. 318.

<sup>25</sup> *People v. Barton*, 44 Barb. 148. As against commissioners of jurors, see *People v. Taylor*, 45 Barb. 129.

<sup>26</sup> *People v. Fogg*, 11 Cal. 351; and see *Bates v. Gerber*, 82 id. 550; compare *Meyer v. Porter*, 65 id. 67.

<sup>27</sup> *State v. Auditor of Hamilton*, 19 Ohio, 116; but see *Burnett v. Auditor of Portage*, 12 id. 54. So it will lie to compel the county auditor to give notice of the election of superior judges. *State v. Twitchell*, 4 Wash. St. 715. It will lie against a sheriff who refuses, upon a proper application, to remit a tax illegally assessed. *Smith v. King*, 14 Oreg. 10. Or to compel a sheriff to execute a writ of execution issued under a judgment rendered in a Justice's Court. *Railroad Co. v. Gardner*, 79 Cal. 213; and see *Habersham v. Sears*, 11 Oreg. 431; 50 Am. St. Rep. 481. Or to compel him to restore possession of premises, ordered by the Supreme Court upon appeal to be delivered to a defendant, who has been wrongfully dispossessed by the agency of the Superior Court. *Quan Wo Chung v. Lanmelster*, 83 Cal. 384. So *mandamus* lies to compel the clerk of the Superior Court to transmit a transcript on appeal which he withholds upon the ground that the appeal bond is defective. *State v. Armstrong*, 5 Wash. St. 123.

<sup>28</sup> *McCauley v. Brooks*, 16 Cal. 11.

<sup>29</sup> *Middleton v. Low*, 30 Cal. 596.

<sup>30</sup> Id.

<sup>31</sup> Id.; see, also, *Land Co. v. Routt*, 17 Col. 156; 31 Am. St. Rep.



A *mandamus* lies to compel the governor of Maryland to issue a commission to which the petitioner is entitled under the state Constitution, that being a ministerial act.<sup>32</sup> The Supreme Court has no authority to issue a *mandamus* to compel a governor of a state to return to another state a fugitive from justice.<sup>33</sup>

§ 5412. **Government.** If all pre-emption laws should be repealed and never re-enacted, a party who has merely entered as a pre-emptor, without payment, would have no right which he could enforce against the government. He would have no action for damages and could not compel the issuing of a patent by *mandamus*.<sup>34</sup>

§ 5413. **Jurisdiction.** The power to issue the writ of *mandamus* is generally confided to the highest court of original jurisdiction.<sup>35</sup> It can not be issued by a court having only appellate powers.<sup>36</sup> A Superior Court will never prescribe how the discretion of an inferior tribunal shall be exercised; but will in proper cases require an inferior court to decide;<sup>37</sup> or it may require an inferior court to proceed to judgment.<sup>38</sup> In the exercise of its ordinary appellate jurisdiction, the Supreme Court can take cognizance of no case until a final judgment or decree shall have been made in the inferior court.<sup>39</sup> The Supreme Court of California has original jurisdiction in cases of *mandamus* under the Constitution as amended in 1879.<sup>40</sup> The Su-

284, *Martin v. Ingham*, 38 Kan. 641; compare *Hovey v. State*, 127 Ind. 588; 22 Am. St. Rep. 663.

<sup>32</sup> *Magruder v. Swann*, 25 Md. 175; see *Magruder v. Tuck*, id. 217.

<sup>33</sup> *Kentucky v. Dennison*, 24 How. (U. S.) 66.

<sup>34</sup> *Hutton v. Frisbie*, 37 Cal. 475; see 8 Opinions of Att.-Gen. 71; 10 id. 57; 11 id. 491; see, also, *Bower v. Higbee*, 9 Mo. 257.

<sup>35</sup> *Kendall v. United States*, 12 Pet. 524; affirming *United States v. Kendall*, 5 Cranch C. C. 163. See, also, as to the power to issue the writ, *State v. Canvassers*, 13 Mont. 23; *State v. Smith*, 6 Wash. St. 496; *People v. Commissioners*, 12 Col. 89; *State v. Nelson County*, 1 N. Dak. 88.

<sup>36</sup> *Howell v. Crutchfield*, Hempst. 99. For the extent of the power of the Circuit Court to issue writs of *mandamus*, see *McIntire v. Wood*, 7 Cranch, 504; *Ex parte Hennen*, 13 Pet. 225; *Knox County v. Aspinwall*, 24 How. (U. S.) 376; *Smith v. Jackson*, 1 Paine, 453.

<sup>37</sup> *Life and Fire Ins. Co. of N. Y. v. Wilson*, 8 Pet. 291.

<sup>38</sup> *Life and Fire Ins. Co. of N. Y. v. Adams*, 9 Pet. 573.

<sup>39</sup> Id.

<sup>40</sup> *Tyler v. Houghton*, 25 Cal. 26; *People v. Weston*, 28 id. 689, and authorities there cited.

preme Court of California has no jurisdiction by its writ of mandate, when directed to a person who acts in his judicial or deliberative capacity, except to compel a performance of his official duty by acting and deciding in the premises to the best of his judgment.<sup>41</sup> The Constitution of California as amended confers upon the superior courts original jurisdiction to issue writs of *mandamus*, *certiorari*, prohibition, and *habeas corpus*,<sup>42</sup> regardless of the amount involved.<sup>43</sup> County Courts have not jurisdiction to issue *mandamus*, nor can it be conferred on them by statute, as it is not a "special case" within the meaning of that term in the Constitution, and such statute is, therefore, unconstitutional.<sup>44</sup> A state court has no jurisdiction to issue a *mandamus* to an officer commissioned by the United States. His conduct can only be controlled by the power that created the office.<sup>45</sup>

§ 5414. Ministerial offices. *Mandamus* may be resorted to to compel an officer to do an act which is sought to be enforced, in all cases where the officer has no discretion, and where he is under obligation to do the specific act.<sup>46</sup> A *mandamus* will not lie to compel a sheriff to make a deed of land to a purchaser, at execution sale, who refuses to pay the purchase money, on the ground that he is entitled to it as oldest judgment and execution creditor; especially when there is an unsettled contest as to the priority of his lien.<sup>47</sup> The Supreme Court will not issue a *mandamus* to the clerks of the superior courts in the first instance.<sup>48</sup> A *mandamus* will not lie against the clerk of the Superior Court, to compel him to issue execution on a money judgment rendered

<sup>41</sup> *Francisco v. Manhattan Ins. Co.*, 36 Cal. 283.

<sup>42</sup> *Perry v. Ames*, 26 Cal. 381; affirmed in *Courtwright v. B. R. & A. W. & M. Co.*, 30 id. 583.

<sup>43</sup> *Cariaga v. Dryden*, 30 Cal. 244. The Superior Court may issue a writ of *mandamus* to run out of the county, or to be executed out of the county in which the court is held, there being nothing in the state Constitution restricting the jurisdiction of the court to the county in which it is held. *Kings County v. Johnson*, 104 Cal. 198.

<sup>44</sup> *People v. Supervisors of Kern Co.*, 45 Cal. 679; *Willcox v. Oakland*, 49 id. 31.

<sup>45</sup> *McClung v. Silliman*, 6 Wheat. 598.

<sup>46</sup> *People ex rel. McDougall v. Bell*, 4 Cal. 177; *Flagley v. Hubbard*, 22 id. 36; *State v. Rotwitt*, 15 Mont. 29.

<sup>47</sup> *Williams v. Smith*, 6 Cal. 91.

<sup>48</sup> *Cowell v. Buckelew*, 14 Cal. 640.

in the court of which he is clerk.<sup>49</sup> *Mandamus* will lie to compel the clerk of the common council to make publication of certain notices which it is his duty to publish.<sup>50</sup> So it will lie to compel a town clerk to deliver the town record to his successor.<sup>51</sup> If an official duty is to be performed by an officer on the happening of a certain event, he can not capriciously refuse to perform it on the plea that he is not satisfied that it has happened. If the fact exists, and it is established by proof, it is his legal duty to be satisfied and perform the act, and *mandamus* will lie.<sup>52</sup>

§ 5415. **Municipal corporations.** Boards of supervisors and bodies like them, without any legislative provision, by general law are subject, with certain exceptions, to *mandamus* to enforce the performance of the duties devolved upon them.<sup>53</sup> Where the board of supervisors act ministerially in the issuance of bonds under act of the Legislature, *mandamus* lies if they improperly refuse.<sup>54</sup> So as to the issue of stock.<sup>55</sup> So where the board of supervisors of a county are empowered to subscribe for the county to the capital stock, and may be compelled to subscribe by writ of mandate.<sup>56</sup> Where it is their duty to provide for the payment of judgments, they must either appropriate for this purpose money already in the treasury, or they must raise the money by taxation;<sup>57</sup> and *mandamus* may compel such levy.<sup>58</sup> Where, however, they act in the exercise of their discretion, there is no authority to interfere with their determination;<sup>59</sup> but when they act under mistake of law, the error may be corrected by *mandamus*, or any other proper proceeding.<sup>60</sup> *Mandamus*

<sup>49</sup> Goodwin v. Glazer, 10 Cal. 333.

<sup>50</sup> Washington v. Page, 4 Cal. 388; but see People v. Board of Supervisors of San Francisco, etc., 27 id. 655.

<sup>51</sup> Taylor v. Henry, 2 Pick. 397; Walter v. Belding, 24 Vt. 658; and see Warner v. Myers, 4 Oreg. 72; State v. Johnson, 30 Fla. 433; Territory v. Shearer, 2 Dak. 332; Driscoll v. Jones, 1 S. Dak. 8.

<sup>52</sup> Stockton R. R. Co. v. Stockton, 51 Cal. 328.

<sup>53</sup> Hastings v. City and County of San Francisco, 18 Cal. 49; Alden v. Alameda Co., 43 id. 270.

<sup>54</sup> C. N. R. R. Co. v. Butte Co., 18 Cal. 671.

<sup>55</sup> People v. Common Council of New York, 45 Barb. 473.

<sup>56</sup> Napa Valley R. R. Co. v. Napa Co., 30 Cal. 435.

<sup>57</sup> People ex rel. Frank v. San Francisco, 21 Cal. 668.

<sup>58</sup> Hoffman v. City of Quincy, 4 Wall. 535; Supervisors v. United States, id. 435; Coy v. Lyons City, 17 Iowa, 1; Robinson v. Supervisors, 43 Cal. 53.

<sup>59</sup> Thomas v. Armstrong, 7 Cal. 287; Fall v. Paine, 23 id. 302.

<sup>60</sup> Id.

does not lie to compel the supervisors of a county to order a special election to fill vacancies in the office of assessor and sheriff.<sup>61</sup> A *mandamus* to a board of supervisors to issue a warrant for a specified sum is irregular; it should direct them to audit the account, and issue warrants accordingly.<sup>62</sup> *Mandamus* is the proper proceeding to try the question whether a board of supervisors have the power to approve a claim against a county;<sup>63</sup> or to compel a board to audit and allow the claims of county officers, etc.<sup>64</sup> But such writ does not control or prescribe the mode, or determine the result of their action.<sup>65</sup>

§ 5416. *Nature of remedy.* The object of the writ is not to supersede legal remedies, but to supply the want of them. The relator must, therefore, have a clear legal right to the performance of a particular act or duty at the hands of the respondent, and it must appear that the law affords no other adequate remedy to secure the enforcement of the right, and the performance of the duty it is sought to coerce.<sup>66</sup> The writ of *mandamus* is the proper remedy to compel inferior tribunals to perform the duties required of them by law;<sup>67</sup> to compel judges to hold their courts,

<sup>61</sup> *People v. Supervisors of Santa Barbara County*, 14 Cal. 102; see *Magee v. Board of Supervisors of Calaveras Co.*, 10 id. 376.

<sup>62</sup> *Tuolumne Co. v. Stanislaus Co.*, 6 Cal. 440. As to law concerning intelligence offices, see *Hall v. Supervisors of San Francisco*, 20 Cal. 591.

<sup>63</sup> *People v. Supervisors*, 28 Cal. 429.

<sup>64</sup> *People v. Supervisors of New York*, 32 N. Y. 473.

<sup>65</sup> *People ex rel. Gas Co. v. Supervisors of San Francisco*, 11 Cal. 42; *Price v. Sacramento Co.*, 6 id. 254.

<sup>66</sup> *Conro v. Port Henry Iron Co.*, 12 Barb. 27; *People v. Green*, 64 N. Y. 499; *Freon v. Carriage Co.*, 42 Ohio St. 30; *Lithographing Co. v. Henderson*, 18 Col. 259; *Bailey v. Lawrence Co.*, 2 S. Dak. 533; *People v. Thompson*, 25 Barb. 73; *Tarver v. Commissioners, etc.*, 17 Ala. 527; *The King v. Nottingham Old Water Works*, 6 Ad. & El. 355; and see § 5409. *ante.* *Mandamus* is a purely legal, civil proceeding, and no element of equity or application of equitable law is or can be involved. *Bright v. Reservoir Co.*, 3 Col. App. 170; *Young v. Wells*, 97 Ind. 410; *State v. Williams*, 69 Ala. 311. The statutes of North Dakota have assimilated the proceeding to a civil action. *State v. Carey*, 2 N. Dak. 36. It is considered to be a harsh remedy, and to be substituted for the ordinary process only in extraordinary cases. *State v. Railroad Co.*, 42 La. Ann. 138; and see *State v. Young*, 38 id. 923; *Blair v. Marye*, 80 Va. 485.

<sup>67</sup> *Carpenter v. Bristol*, 21 Pick. 258; *Commonwealth v. Hamden*, 2 id. 414.

and county officers to keep their offices at a county seat.<sup>68</sup> A writ of *mandamus* is not the appropriate remedy for orders made in a cause by a judge, in the exercise of his authority, although they may bear harshly upon the party; nor to compel any person, inferior officer, court, or corporation to act in any particular manner, when such person, officer, court, or corporation is invested with discretionary power.<sup>69</sup> That discretion can not be controlled by this writ, but if it refuses to exercise its discretion, a *mandamus* will lie to compel it to do so.<sup>70</sup>

§ 5417. *Quo warranto*. *Mandamus* may issue to restore a person to office from which he has been illegally removed;<sup>71</sup> or to compel the admittance of one to an office from which he is unlawfully excluded.<sup>72</sup> If a county judge refuses to appoint commissioners to appraise land, in a proceeding to condemn the same, a writ of mandate will be issued compelling him to do so.<sup>73</sup>

§ 5418. *Religious corporations*. A *mandamus* may issue to compel a religious corporation to admit a minister to the pulpit;<sup>74</sup> but not to restore a minister to his clerical rights and functions, where there are no fees or emoluments attached to

<sup>68</sup> *Calaveras County v. Brockway*, 30 Cal. 325. *Mandamus* to judges or in judicial proceedings. See *Scott v. Superior Court*, 75 Cal. 114; *Whaley v. King*, 92 id. 431; *Donahue v. Superior Court*, 93 id. 252; *Strong v. Grant*, 99 id. 100; *State v. Hunter*, 4 Wash. St. 651; *Brown v. Circuit Judge*, 75 Mich. 274; 13 Am. St. Rep. 438; *Mansfield v. First Nat. Bank*, 6 Wash. St. 603; *Tomkin v. Harris*, 90 Cal. 201; *State v. Van Ness*, 31 Fla. 594; *Virginia v. Rives*, 100 U. S. 813.

<sup>69</sup> *People, etc. v. Bell*, 4 Cal. 177; *People ex rel. Flagley v. Hubbard*, 22 id. 34; *People v. Weston*, 28 id. 640, and authorities there cited; *People v. Pratt*, id. 166; 87 Am. Dec. 110; *Ex parte Whitney*, 13 Pet. 404; *Gaines v. Relf*, 15 id. 9; and see § 5409, *ante*; *People v. District Court*, 18 Col. 26.

<sup>70</sup> *People v. Supervisors of Westchester*, 12 Barb. 446; *Commonwealth v. The Judges, etc.*, 3 Binn. 273; *Roberts v. Holsworth*, 5 Halst. 57; *Jacobs v. Board of Supervisors*, 100 Cal. 121.

<sup>71</sup> *Singleton v. Commissioners*, 2 Bay, 105; *Dew v. Judges*, 3 Hen. & M. 1; *Street v. Gallatin County Commissioners*, Breese, 25.

<sup>72</sup> *Strong, Petitioner*, 20 Pick. 484; and see *Kelly v. Edwards*, 69 Cal. 460.

<sup>73</sup> *Lake Merced Water Co. v. Cowles*, 31 Cal. 215; *United States v. Guthrie*, 17 How. (U. S.) 284.

<sup>74</sup> *Runkel v. Winemiller*, 4 Har. & M. 459; *People ex rel. Griffen v. State*, 1 Edm. 505.

his office.<sup>75</sup> It may issue to compel the clerk or treasurer of a religious society to deliver the records to his successor.<sup>76</sup>

§ 5419. **State officers.** *Mandamus* will issue to compel the secretary of the state of Louisiana to affix his official signature.<sup>77</sup> But it will not compel the secretary of state to certify a bill or an enrolled act to be a law which is not among the archives of his office.<sup>78</sup> It may issue to compel a secretary of state to deliver a commission.<sup>79</sup> Where it was the duty of the controller to have issued warrants upon the treasury for the sums claimed under a state prison contract, the performance of this can be enforced by *mandamus*.<sup>80</sup> A *mandamus* may issue to compel the controller of state to account to a member of the Legislature for the daily compensation fixed by law.<sup>81</sup> As no action can be maintained against the state, the court will not permit a claim to be enforced circuitously by *mandamus* against the treasurer.<sup>82</sup> *Mandamus* may issue to compel the speakers of two houses to issue a certificate of election.<sup>83</sup>

§ 5420. **What writ shall issue.** When the application to the court is made, without notice to the adverse party, and the writ be allowed, the alternative must be first issued; but if the application be upon due notice, and the writ be allowed, the peremptory may be issued in the first instance.<sup>84</sup>

<sup>75</sup> *Union Church v. Sanders*, 1 Houst. 100; and see *Sale v. Baptist Church*, 62 Iowa, 26; 49 Am. Rep. 136.

<sup>76</sup> *St. Luke's Church v. Slack*, 7 Cush. 226. *Mandamus* to enforce acts by private corporations generally. See *People v. Railroad Co.*, 17 Abb. N. C. 304; 104 N. Y. 58; *State v. Railroad Co.*, 29 Neb. 412; *County of Fresno v. Canal Co.*, 68 Cal. 359; *Combs v. Ditch Co.*, 17 Col. 146; 31 Am. St. Rep. 275.

<sup>77</sup> *State v. Wrotnowski*, 17 La. Ann. 156.

<sup>78</sup> *People v. Hatch*, 33 Ill. 9.

<sup>79</sup> *Marbury v. Madison*, 1 Cranch, 137.

<sup>80</sup> *McCauley v. Brooks*, 16 Cal. 11; *Page v. Hardin*, 8 B. Mon. 648; see *Patty v. Colgan*, 97 Cal. 251.

<sup>81</sup> *Fowler v. Pierce*, 2 Cal. 165.

<sup>82</sup> *Weston v. Dane*, 51 Me. 461.

<sup>83</sup> *State v. Moffitt*, 5 Ohio. 358; and see *State v. Elder*, 31 Neb. 169. *Mandamus* to compel the holding of an election. See *People v. San Diego*, 85 Cal. 369; *Gibbs v. Bartlett*, 63 id. 117; *Wiedwald v. Dodson*, 95 id. 450; to control canvassing board. *Page v. Board of Supervisors*, 85 Cal. 50; *Darrow v. People*, 8 Col. 417; *Rosenthal v. Board of Canvassers*, 50 Kan. 129; *Territory v. Board of Commissioners*, 4 N. Mex. 204.

<sup>84</sup> Cal. Code Civ. Pro., § 1088; see *Wilson v. Hunt*, 16 Pac. Rep. 305.

§ 5421. **When writ may issue.** The writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law,<sup>85</sup> and only in cases where the act to be done is ministerial.<sup>86</sup> When the effect of the application is to bring under review the decision of a superior court, the appellate jurisdiction given by the Constitution attaches, and may be exercised by the means of the writ of *mandamus*.<sup>87</sup> So it may issue to compel a court to certify a case to the Circuit Court of the United States.<sup>88</sup> It is the only adequate mode of relief where an inferior tribunal refuses to act upon a subject brought properly before it.<sup>89</sup> The Supreme Court has the right to compel inferior tribunals to proceed to hear and determine causes of which they refuse to take cognizance, and this by virtue of its appellate powers, and its authority to issue process necessary to give them effect.<sup>90</sup> An order made in an action pending in the District Court, staying all proceedings therein until the further direction of the court, is not an appealable order. The remedy of a party prejudiced thereby is by application for a *mandamus* to compel the court to proceed.<sup>91</sup> So of an order expelling certain attorneys from the bar, on the ground that they had set at defiance the authority of the court.<sup>92</sup> A *mandamus* is the proper remedy to compel their restoration.<sup>93</sup>

Where the act of signing a judgment is merely ministerial, a *mandamus* may issue requiring the judge of an inferior court to do it.<sup>94</sup> So upon an affidavit showing that the judge has neg-

<sup>85</sup> Id., § 1086; *Merced Mining Co. v. Fremont*, 7 Cal. 130; § 5409, *ante*.

<sup>86</sup> *Draper v. Noteware*, 7 Cal. 276; *United States v. Guthrie*, 17 How. (U. S.) 284; *United States v. Seaman*, id. 225; *Insurance Co. v. Fyler*, 60 Conn. 418; 25 Am. St. Rep. 337; *United States v. Black*, 128 U. S. 40.

<sup>87</sup> *People v. Turner*, 1 Cal. 143; 52 Am. Dec. 295.

<sup>88</sup> See *Spraggins v. County Court of Humphries*, 1 Cooke, 160; but see, in certain cases, *Ladd v. Tudor*, 3 Woodb. & M. 325.

<sup>89</sup> *Life and Fire Ins. Co. of New York v. Wilson*, 8 Pet. 291; § 5416, *ante*.

<sup>90</sup> *Purcell v. McKune*, 14 Cal. 231; *Smith v. Jackson*, 1 Paine, 453; *Matter of Turner*, 5 Ohio, 542, 544.

<sup>91</sup> *Rhodes v. Craig*, 21 Cal. 419; *People v. District Court*, 14 Col. 396.

<sup>92</sup> *People v. Turner*, 1 Cal. 143; 52 Am. Dec. 295.

<sup>93</sup> Id.; *Herrington v. Sawyer*, 36 Cal. 289; *State v. Sachs*, 2 Wash. St. 373; *State v. Finley*, 30 Fla. 302; see *Ex parte Bradley*, 7 Wall. 364; *People v. Justices of Delaware*, 1 Johns. Cas. 181; *Withers v. State*, 36 Ala. 252.

<sup>94</sup> *Life and Fire Ins. Co. of New York v. Wilson*, 8 Pet. 291.



lected or refused to enter judgment,<sup>95</sup> to enter judgment on the report of a referee,<sup>96</sup> or to compel a justice of the peace to enter a judgment of discontinuance.<sup>97</sup> But when the act to be done is judicial or discretionary, the writ will not direct what decision shall be made, nor will it be granted after the inferior tribunal has acted, for the purpose of reviewing the legality of its decision.<sup>98</sup> A *mandamus* may issue to compel a judge to settle a bill of exceptions first, and then to sign it;<sup>99</sup> or a statement on motion for a new trial;<sup>100</sup> or to set aside the grant of a new trial.<sup>101</sup> A peremptory writ of *mandamus* is a proper remedy to enforce delivery of books, papers, etc., to a newly-elected judge of probate.<sup>102</sup>

Where, pending a motion for a new trial in the District Court, the defendants violate an injunction previously issued by said District Court, this court will issue a *mandamus* against the judge of such District Court to compel him to issue his attachment for contempt.<sup>103</sup> A *mandamus* will issue from a superior to an inferior court to compel the issuance of an attachment for contempt, where the proceeding is, in substance, a private right, though in form of a case of contempt.<sup>104</sup> The court may grant a peremptory *mandamus* to compel a district judge to execute a sentence pronounced by him, although subsequently to its rendition an act of the Legislature of the state comprising the district was passed, authorizing the governor of the state to prevent its execution.<sup>105</sup>

<sup>95</sup> *Ex parte* Bradstreet, 6 Pet. 774.

<sup>96</sup> In this case there was no remedy by appeal. *Russell v. Elliott*, 2 Cal. 245.

<sup>97</sup> *Anderson v. Pennle*, 32 Cal. 265. So *mandamus* will lie to compel a justice of the peace to issue an order to compel a garnishee to appear and testify under oath. *State v. Eddy*, 10 Mont. 311.

<sup>98</sup> *People v. Sexton*, 24 Cal. 78.

<sup>99</sup> *People v. Lee*, 14 Cal. 512; *People v. Judges*, 1 Cal. 511; *McDonald v. Sheldon*, 2 Kan. 322; *State v. Todd*, 4 Ohio, 351; and see *Thornton v. Hoge*, 84 Cal. 231. But he can not be so compelled after the expiration of his term of office. *Leach v. Aitken*, 91 Cal. 484; see, also, *Coffey v. Grand Council*, 87 id. 367.

<sup>100</sup> *People v. Rosborough*, 29 Cal. 415; *Keane v. Murphy*, 19 Nev. 89; *Whitmore v. Harris*, 10 Utah, 259.

<sup>101</sup> *People v. Superior Court*, 10 Wend. 285.

<sup>102</sup> *Crowell v. Lambert*, 10 Minn. 369.

<sup>103</sup> *Ortman v. Dixon*, 9 Cal. 23; *Merced Mining Co. v. Fremont*, 7 id. 130.

<sup>104</sup> *Merced Mining Co. v. Fremont*, 7 Cal. 130.

<sup>105</sup> *United States v. Peters*, 5 Cranch, 115. *Mandamus* is the proper



§ 5422. *When it will not issue.* A *mandamus* will not lie where a party may have a remedy by a writ of error;<sup>106</sup> as on an order punishing for contempt;<sup>107</sup> nor where there is any other specific, speedy, and adequate remedy,<sup>108</sup> and one competent to afford relief upon the very subject-matter;<sup>109</sup> nor will it lie if the right of the party applying therefor is not clear.<sup>110</sup> The general rule that a *mandamus* will not lie where the party has another remedy must be understood to refer to some specific remedy which will place the party in the same situation in which he was before the act complained of;<sup>111</sup> as where there is a remedy by appeal, as to compel the entry of a decree on the report of a referee;<sup>112</sup> so from order denying the trebling of damages in

proceeding to compel an officer to pay warrants drawn on a special fund who refuses to pay. *Hockaday v. Commissioners*, 1 Col. App. 362; and see *McCanoughey v. Jackson*, 101 Cal. 265. Or to compel the mayor of a city to sign bonds. *Chalk v. White*, 4 Wash. St. 156. But it will not lie in California to compel payment of money out of a fund which the law does not allow to be applied to the use sought. *Priet v. Reis*, 93 Cal. 85. *Mandamus* to board of education. See *Ralsch v. Board of Education*, 81 Cal. 542; *Eby v. School Trustees*, 87 id. 166; *State v. School District*, 31 Neb. 552; *Wintz v. Board of Education*, 28 W. Va. 227. It is the proper remedy to restore a teacher in the public schools to a right given by express law, from which he is unlawfully precluded. *Kennedy v. Board of Education*, 82 Cal. 483; *Morley v. Power*, 73 Tenn. 691. Or to reinstate a pupil wrongfully excluded. *Perkins v. Directors*, 56 Iowa, 476. It is the proper remedy to reinstate an appeal. *State v. District Court*, 13 Mont. 370. Or to compel an original hearing in a chancery suit. *Brown v. Circuit Judge*, 75 Mich. 274; 13 Am. St. Rep. 438. If a board of county commissioners has fixed licenses under a wrong statute, *mandamus* will lie to compel it to fix them under the right statute. *Territory v. McPherson*, 6 Dak. 27.

<sup>106</sup> *United States v. Addison*, 22 How. (U. S.) 174; *Commissioner of Patents v. Whiteley*, 4 Wall. 522.

<sup>107</sup> *People v. Turner*, 1 Cal. 152.

<sup>108</sup> *Crandall v. Amador County*, 20 Cal. 72; *People v. Olds*, 3 id. 175; *Louisville R. R. Co. v. State*, 25 Ind. 177; § 5409, *ante*.

<sup>109</sup> *Fremont v. Crippen*, 10 Cal. 211.

<sup>110</sup> *United States v. Bank of Alexandria*, 1 Cranch C. C. 7; *State v. Justices of Moore*, 2 Ired. 430; *People v. Spruance*, 8 Col. 307; *State v. Hunter*, 4 Wash. St. 651; *People v. Brooklyn*, 1 Wend. 318; § 5421, *ante*.

<sup>111</sup> *Etheridge v. Hall*, 7 Port. 47; *People v. Supervisors of Greene*, 12 Barb. 217; 17 Ala. 527; 13 Penn. St. 72.

<sup>112</sup> *Ludlum v. Fourth District Court*, 9 Cal. 12; and see *People v. Superior Court*, 114 id. 466; *State v. Allen*, 8 Wash. St. 168.

forcible entry and detainer;<sup>113</sup> so where a court refuses to enter judgment for costs;<sup>114</sup> or a judgment of dismissal.<sup>115</sup> A claim to a writ of *mandamus* can not be sustained if there is any other equally effectual remedy.<sup>116</sup> *Mandamus* will not lie to compel a court to proceed with the trial after an order changing the place of trial; or where the District Court refuses to transfer an indictment to another District Court for trial;<sup>117</sup> nor to command him to recall an order after final judgment, if an appeal could be taken;<sup>118</sup> nor to compel a circuit judge to vacate an order;<sup>119</sup> nor where a court refuses to proceed for want of a statement, in a chancery case;<sup>120</sup> nor for refusal or allowance of a change of venue;<sup>121</sup> nor to reinstate a case when the appeal has been dismissed, even if the court acted erroneously in dismissing it.<sup>122</sup> In a matter in which the County Court has final jurisdiction and acts, there is no remedy, even if it acts erroneously;<sup>123</sup> as in the entering of judgment;<sup>124</sup> or the filling of a blank in a judgment with the amount of costs, after judgment was affirmed by the Supreme Court.<sup>125</sup> The Supreme Court will not issue a *mandamus* to compel a superior judge to decide contrary to his own judgment;<sup>126</sup> nor to compel a judge to issue a warrant of arrest in a particular case;<sup>127</sup> nor to re-examine a decision on the sufficiency of the affidavit to hold to bail;<sup>128</sup> nor to compel a District Court to expunge amendments improperly made in the record

<sup>113</sup> *Early v. Mannix*, 15 Cal. 149.

<sup>114</sup> *Peralta v. Adams*, 2 Cal. 594.

<sup>115</sup> *People v. Pratt*, 28 Cal. 166; 87 Am. Dec. 110; see *In re Spring Valley Water Works*, 17 Cal. 132.

<sup>116</sup> *Bush v. Beavan*, 1 Hurl. & Colt. 500. The writ will not be allowed to usurp the office of a writ of error, nor will it be made use of to anticipate an erroneous decision by a subordinate court. *People v. Judge, etc.*, 18 Cal. 500; *People v. Clerk, etc.*, 22 id. 280.

<sup>117</sup> *People, etc. v. Judge of Twelfth District*, 17 Cal. 547.

<sup>118</sup> *People v. Moore*, 29 Cal. 427.

<sup>119</sup> *State v. Taylor*, 19 Wis. 566; see, generally, *State v. Carney*, 3 Kan. 88.

<sup>120</sup> *Purcell v. McKune*, 14 Cal. 230.

<sup>121</sup> *People ex rel. Flagley v. Hubbard*, 22 Cal. 34.

<sup>122</sup> *People v. Weston*, 28 Cal. 639; *Lewis v. Barclay*, 35 id. 213.

<sup>123</sup> *Id.*

<sup>124</sup> *Carlaga v. Dryden*, 29 Cal. 307.

<sup>125</sup> *Ex parte Many*, 14 How. (U. S.) 24.

<sup>126</sup> *United States v. Lawrence*, 3 Dall. 42.

<sup>127</sup> *Id.*

<sup>128</sup> *Ex parte Taylor*, 14 How. (U. S.) 3.

returned to the Circuit Court on a writ of error;<sup>129</sup> nor to compel a judge to allow a defendant to take possession of goods provisionally seized, upon his depositing in court a sum to be fixed by the judge;<sup>130</sup> nor to compel a District Court to review its judgment;<sup>131</sup> nor to permit an allowance of double pleas;<sup>132</sup> nor to permit the intervention of new parties;<sup>133</sup> nor will it compel a court to withdraw an issue, and direct a new issue to be made up.<sup>134</sup> It will not be issued to admit a person to an office while another holds it under color of right.<sup>135</sup> If an office is filled *de facto*, it will not lie for the purpose of trying title to it.<sup>136</sup>

§ 5423. **Alternative mandamus.**

*Form No. 1206.*

[TITLE.]

The people of the state of California to [the tribunal, corporation, board, or person to whom it is directed], greeting:

Whereas it manifestly appears to us by the affidavit of J. Q., on the part of the said A. B., the plaintiff and the party beneficially interested herein, that [state generally the allegation against the party to whom it is directed], and that there is not a plain, speedy, and adequate remedy in the ordinary course of law:

Therefore, we do command you that immediately after the

<sup>129</sup> *Smith v. Jackson*, 1 Paine, 453.

<sup>130</sup> *State v. Judge of the Third District*, 17 La. Ann. 328.

<sup>131</sup> *Ex parte Hoyt*, 13 Pet. 279.

<sup>132</sup> *Ex parte Davenport*, 6 Pet. 661.

<sup>133</sup> *White v. United States*, 1 Black, 501.

<sup>134</sup> *Bank of Columbia v. Sweeny*, 1 Pet. 567.

<sup>135</sup> *State v. Auditor*, 36 Mo. 70; *Kelly v. Edwards*, 69 Cal. 460.

<sup>136</sup> *Meredith v. Board of Supervisors*, 50 Cal. 433; *Henderson v. Glynn*, 2 Col. App. 303. *Mandamus* will not lie to enforce private contracts. *Tobey v. Hakes*, 54 Conn. 274; *State v. Bridge Co.*, 20 Kan. 404. It will not lie to compel the board of medical examiners to issue a certificate to practice medicine to an applicant whose demand has been refused. *State v. Board of Medical Examiners*, 10 Mont. 162. It is never awarded to aid in the collection of an illegal claim. *State v. Getchell*, 3 N. Dak. 243; *State v. Currie*, id. 310. Award of writ where question of title to real estate is in issue. See *Eby v. School Trustees*, 87 Cal. 166. It will not be awarded to review a ruling or interlocutory order made in the progress of a cause. *Scott v. Superior Court*, 75 Cal. 114; *Lake v. King*, 16 Nev. 215. Nor is it the proper proceeding by which to try the title to an office. *Biggs v. McBride*, 17 Oreg. 640; *Gregory v. Blanchard*, 98 Cal. 311; *State v. Callahan*, 4 N. Dak. 481.

receipt of this writ you do [the act required to be performed], or that you show cause before this court, at the courtroom thereof in the city hall, in the ..... county of ....., on the ..... day of ....., 18.., at the opening of the court on that day, why you have not done so.

Witness, the Hon. J. P., judge of our Superior Court of the state of California, at the ....., in the ..... county of ....., and the seal of said court, this ..... day of ....., 18..<sup>137</sup>

**§ 5424. Disobedience of writ.** When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has without just excuse refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of disobedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.<sup>138</sup>

**§ 5425. Form of writ.** The writ may be either alternative or peremptory; the alternative writ shall state generally the allegation against the party to whom it is directed, and command such party, immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted, and a return day inserted.<sup>139</sup> The writ must recite all the facts entitling the relator to have the act done for which he asks.<sup>140</sup> It is not enough to refer to the petition and affidavits.<sup>141</sup> The com-

<sup>137</sup> The form of petition or affidavit is not given, as it is like any affidavit or complaint in other proceedings. The facts should be set out.

<sup>138</sup> Cal. Code Civ. Pro., § 1097.

<sup>139</sup> Id., § 1087.

<sup>140</sup> Commercial Bank v. Canal Com'rs, 10 Wend. 25.

<sup>141</sup> Id.; McLeod v. Scott, 21 Oreg. 94; Elliott v. Oliver, 22 Id. 44; People v. Supervisors of Westchester Co., 15 Barb. 760.

mand of the writ must be according to the duty.<sup>142</sup> The writ must correspond to the order directing its issue.<sup>143</sup> One and the same writ can not be directed to two several townships.<sup>144</sup> It is not fatal if it be directed to the members of a corporation, instead of the corporation by its corporate name.<sup>145</sup>

§ 5426. **Peremptory mandamus.**

*Form No. 1207.*

[TITLE.]

The people of the state of California to [the tribunal, corporation, board, or person to whom it is directed], greeting:

Whereas it manifestly appears to us by the affidavit of J. Q., on the part of the said A. B., the plaintiff and the party beneficially interested herein, that [state generally the allegation against the party to whom it is directed], and that there is not a plain, speedy, and adequate remedy in the ordinary course of law:

Therefore, we do command you that immediately after the receipt of this writ you do [the act required to be performed]. And of this writ, and what you have done thereunder, make due return on or before the ..... day of ....., 18..

Witness, the Hon. J. P., judge of the Superior Court of the state of California, at the courthouse in the ..... county of ....., and the seal of said court, this ..... day of ....., 18..

J. K., Clerk.

By L. M., Deputy Clerk.

§ 5427. **Proceedings and practice on mandamus,—affidavit.** It shall be issued upon affidavit, on the application of the party beneficially interested.<sup>146</sup> It must be shown distinctly by the

<sup>142</sup> *People v. Supervisors of Dutchess Co.*, 1 Hill, 50; *People v. Supervisors of New York*. *Id.* 62.

<sup>143</sup> *Hawkins v. More*, 3 Ark. 345.

<sup>144</sup> *State v. Chester & Evesham*, 5 Halst. 292.

<sup>145</sup> *Fuller v. Plainfield Academic School*, 6 Conn. 532. For forms of writ of *mandamus*, commanding city council to direct city treasurer to pay claims allowed by school board, see *State v. City of Cincinnati*, 19 Ohio, 182.

<sup>146</sup> Cal. Code Civ. Pro., § 1086; *People v. Pacheco*, 29 Cal. 210; *Ex parte Fleming*, 2 Wall. 759; *Eby v. Board of Trustees*, 87 Cal. 166; *Hyatt v. Allen*, 54 *Id.* 353; *Peck v. Board of Supervisors*, 90 *Id.* 384. When *mandamus* proceedings are instituted to redress a private wrong or enforce a private right, the party beneficially

affidavits that the possession under a writ of restitution was acquired under the parties, or subsequent to the filing of a *lis pendens*, or the applications will be denied.<sup>147</sup>

§ 5428. **Demand a condition precedent.** It is an imperative rule of the law of *mandamus* that previously to the making of the application to the court for the writ, to command the performance of a particular act, an express and distinct demand or request to perform it must have been made by the prosecutor to the defendant, who must have refused to comply with such demand, either in direct terms or by conduct from which a refusal can be conclusively implied — it being due to the defendant to have the option of either doing or refusing to do that which is required of him before an application shall be made to the court for the purpose of compelling him.<sup>148</sup>

§ 5429. **Determination.** Judgment may be affirmed as to the *mandamus*, and reversed as to the costs.<sup>149</sup> In *mandamus* to compel the execution of a sheriff's deed, the proceeding does not involve the determination of a right or interest in real estate. The relator claims only an official document, the possession of which will enable him to assert any rights he may have acquired. The awarding of the *mandamus* can not determine these rights or in any respect the interest of third parties.<sup>150</sup>

§ 5430. **Hearing.** The writ can not be granted by default. The case shall be heard by the court, whether the adverse party interested should be named as plaintiff. *Smith v. Lawrence*, 2 S. Dak. 185; *Howard v. City of Huron*, 5 id. 539. The affidavit upon which the writ is issued may be treated as a complaint. *McCrary v. Beaudry*, 67 Cal. 120. The writ should be commenced in the name of the sovereign power on the relation of the party aggrieved. *Collet v. Allison*, 1 Okl. 42; *Rider v. Brown*, id. 244; *State v. Carey*, 2 N. Dak. 36. If the writ is sought for the benefit of the relator alone, the fact of his special and peculiar right to the writ must be made to appear by the affidavit. Id. In an application for *mandamus* against an assessor to compel him to extend special taxes levied by town authorities, the town, as relator, is the proper party. *Aggers v. People, etc.*, 20 Col. 348.

<sup>147</sup> *Fogarty v. Sparks*, 22 Cal. 143.

<sup>148</sup> *People v. Romero*, 18 Cal. 90; *Crandall v. Amador County*, 20 id. 72; *Oroville & Virginia City R. R. Co. v. Supervisors of Plumas County*, 37 id. 363; see *Price v. Riverside, etc., Co.*, 56 id. 431; *People v. Reis*, 76 id. 269.

<sup>149</sup> *McDougal v. Roman*, 2 Cal. 80.

<sup>150</sup> *McMillan v. Richards*, 9 Cal. 365.

appear or not.<sup>151</sup> If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case.<sup>152</sup> If a material question of fact be raised by the answer, the court may, in its discretion, order it tried by a jury, and postpone the argument until the trial can be had and the verdict certified to the court. The question must be distinctly stated in the order for trial, and the county designated where the trial shall be had.<sup>153</sup>

**§ 5431. Judgment.** If judgment be given for the applicant, he may recover the damages he has sustained, as found by the jury, or as may be determined by the court or referee, upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and a peremptory mandate must also be awarded without delay.<sup>154</sup> A disobedience of a peremptory mandate may be punished by fine not exceeding one thousand dollars, and if the refusal to obey the writ is persisted in, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.<sup>155</sup>

**§ 5432. New trial.** The motion for a new trial must be made in the court in which the issue of fact was tried.<sup>156</sup> If no notice for a new trial be given, or if given, be denied, the clerk, within five days after the rendition of the verdict or denial of the motion, shall transmit to the court in which the application for the writ is pending a certified copy of the verdict attached to the order of trial; after which either party may bring on the argument of the application, upon reasonable notice to the adverse party.<sup>157</sup>

<sup>151</sup> Cal. Code Civ. Pro., § 1088.

<sup>152</sup> Id., § 1094. In such case the court may hear and determine the matter on the pleadings. *Town of Hayward v. Pimental*, 107 Cal. 386.

<sup>153</sup> Cal. Code Civ. Pro., § 1090.

<sup>154</sup> Id., § 1095; see, also, Id., § 1090. Judgment in *mandamus* proceeding. See *Price v. Riverside, etc., Co.*, 56 Cal. 431; *Johnson v. Supervisors*, 65 Id. 481.

<sup>155</sup> Cal. Code Civ. Pro., § 1097.

<sup>156</sup> Id., § 1092.

<sup>157</sup> Id., § 1093.

**§ 5433. Notice of the application.***Form No. 1208.*

To .....

You are hereby notified that ..... will apply to the Superior Court within and for the county of ....., on the first day of its next term, for a writ of *mandamus* to issue against you, commanding you [here state the prayer of the petition, and so much of the facts as shows what the party is required to do].

[DATE.]

[SIGNATURE.]

**§ 5434. Notice of application.** The notice of the application, when given, shall be at least ten days. The writ shall not be granted by default.<sup>158</sup> Where notice of the motion, and a copy of the papers on which the motion is founded, have been duly served on the district judge, this court may, in its discretion, issue either an alternative or a peremptory writ, in the first instance.<sup>159</sup>

**§ 5435. Proceedings, where commenced.** Proceedings for a *mandamus* to compel the execution of a sheriff's deed to a redemptioner can be commenced in the county where the relator resides.<sup>160</sup> The provisions of the statute that actions against a public officer for acts done by him in virtue of his office shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, and not to mere omissions or neglect of official duty.<sup>161</sup> The rules of the Civil Practice Act are applicable to pleadings and proceedings in *mandamus*.<sup>162</sup>

**§ 5436. Relief awarded.** If judgment be given for the applicant, he may recover the damages which he has sustained, as found by the jury, or as may be determined by the court or referee upon a reference to be ordered, together with costs; and for such damages and costs an execution may issue, and a per-

<sup>158</sup> Cal. Code Civ. Pro., § 1088.

<sup>159</sup> *People v. Turner*, 1 Cal. 143; 52 Am. Dec. 295.

<sup>160</sup> *McMillan v. Richards*, 9 Cal. 420.

<sup>161</sup> *Id.* 365; 70 Am. Dec. 655.

<sup>162</sup> *People v. Board of Supervisors of San Francisco*, 27 Cal. 665. Liberality in matters of pleading and practice in proceedings by *mandamus* to compel the delivery of water for irrigation. *Townsend v. Ditch Co.*, 17 Col. 142; see *Merrill v. Irrigation Co.*, 112 Cal. 426.



emptory mandate must also be awarded without delay.<sup>163</sup> Where an alternative writ is not procured, the court may grant any relief consistent with the case made by the petition and embraced within the issue, although it may be only part of that asked in the prayer of the petition.<sup>164</sup>

§ 5437. **Return.** The return, to be sufficient, must show a legal justification;<sup>165</sup> as that a bill of exceptions tendered was not a true bill.<sup>166</sup> When objectionable, the judge should return the causes of objection.<sup>167</sup> In a return to a *mandamus* to restore a member to a church, the power of those to expel him should be stated.<sup>168</sup> The return must respond to the allegations of the writ.<sup>169</sup> Under the Code, issue may be taken on the truth of the return. At common law, the return was conclusive.<sup>170</sup> The return may be amended.<sup>171</sup> The proper way for the justices of a county to make return to a *mandamus* is for them to convene, and a majority being present, to fix upon the facts they mean to rely on by way of defense, and appoint some one of their body to make affidavit, and to do all other things required by the proceeding.<sup>172</sup>

§ 5438. **Service of writ.** The writ shall be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not.<sup>173</sup>

<sup>163</sup> Cal. Code Civ. Pro., § 1095.

<sup>164</sup> *People v. Board of Supervisors of San Francisco*, 27 Cal. 665.

<sup>165</sup> *Burnet v. Auditor, etc.*, 12 Ohio, 54.

<sup>166</sup> *State v. Todd*, 4 Ohio, 351.

<sup>167</sup> *People v. Pearson*, 2 Scam. 189.

<sup>168</sup> *Green v. African Meth. Church*, 1 Sandf. 254.

<sup>169</sup> *Gorgas v. Blackburn*, 14 Ohio, 252. When the return puts in issue no material facts affecting the substantial rights of the parties, the court may hear and determine the case upon questions of law alone. *Howard v. City of Huron*, 5 S. Dak. 539.

<sup>170</sup> *State v. Will. Bridge Co.*, 3 Harr. 540.

<sup>171</sup> *Springfield v. Hamden*, 10 Pick. 59.

<sup>172</sup> *Lander v. McMillan*, 8 Jones L. 174.

<sup>173</sup> Cal. Code Civ. Pro., § 1096. Failure to serve a copy of the petition and writ upon the opposite party as required by rule of court, is ground for dismissing the petition, if no offer is made to comply with the rule. *Coffey v. Grand Council*, 87 Cal. 367.

§ 5439. **Pleadings in mandamus — answer.** On the return of the alternative, or the day on which the application of the writ is noticed, the party on whom the writ or notice has been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.<sup>174</sup> The answer of a board of supervisors should be in form the answer of the board in its aggregate capacity.<sup>175</sup> And the fact that it was sworn to by one member of the board does not make it his answer, nor is it necessary that such answer should aver that the board by resolution adopted it.<sup>176</sup> If two answers be filed, each in form of the answer of the board, the court may ascertain which is the return of the majority.<sup>177</sup>

§ 5440. **Demurrer to answer.** On the trial, the applicant shall not be precluded by the answer of any valid objection to its sufficiency, and may countervail it by proof, either in direct denial, or by way of avoidance.<sup>178</sup> A motion for judgment on the pleadings is equivalent to a demurrer to the answer, and objections which are required to be taken by special demurrer will be disregarded on such motion.<sup>179</sup> The general rule that if a party whose duty it is to perform some act bases his refusal to perform it on some defect in the proceedings of his adversary, he will not afterwards be permitted to allege a new or additional defect, does not apply to officers whose duties are governed by law.<sup>180</sup>

§ 5441. **Petition for mandamus.** The writ is issued upon affidavit, on the application of the party beneficially interested.<sup>181</sup> An application for a writ of *mandate*, to compel the performance of some act in which a large number of individuals are interested, which is made in the name of the people, and is not signed by the attorney-general, but by an attorney of the relator, will not be dismissed because not made in the name of some

<sup>174</sup> Cal. Code Civ. Pro., § 1089.

<sup>175</sup> People v. Board of Supervisors, 27 Cal. 665.

<sup>176</sup> Id.

<sup>177</sup> Id. As to answer of treasurer on demand made upon him to pay a warrant drawn by the auditor, see Keller v. Hyde, 20 Cal. 594; Connor v. Morris, 23 id. 451.

<sup>178</sup> Cal. Code Civ. Pro., § 1091.

<sup>179</sup> People v. Board of Supervisors, 27 Cal. 665; Ward v. Flood, 48 id. 36.

<sup>180</sup> Id.; 17 Am. Rep. 405.

<sup>181</sup> Cal. Code Civ. Pro., § 1086; see § 5427, *ante*.

one interested, if the attorney-general unites in the brief in support of the application.<sup>182</sup> A petition for a *mandamus* to compel county commissioners to declare the petitioner register of deeds should aver affirmatively that a vacancy existed when the alleged election took place.<sup>183</sup> A statement in a petition against a comptroller is bad if it fails to allege that there is "money not otherwise appropriated by law" out of which the compensation in question is to be paid.<sup>184</sup> In an application for a writ of mandate to compel a board of supervisors to levy a tax, the county into whose treasury the money intended to be raised by the tax will go can be the relator.<sup>185</sup>

§ 5441a. *Mandamus* — miscellaneous. In an application to the Supreme Court for *mandamus*, no alternative writ will be issued, unless the allegations in the petition therefor make out a *prima facie* case for the issuance of a peremptory writ.<sup>186</sup> An alternative writ of *mandamus* was quashed because it appeared that the motion for a new trial, which it directed the district

<sup>182</sup> *People v. Board of Supervisors of San Francisco*, 36 Cal. 595. Averments necessary in petition for a *mandamus* to a county treasurer to pay county warrants. See *Connor v. Morris*, 23 Cal. 447. For sufficient statement in *mandamus* on declaring the result of an election, see *Calaveras Co. v. Brockway*, 30 Cal. 325.

<sup>183</sup> *Rose v. County Commissioners*, 50 Me. 243.

<sup>184</sup> *Redding v. Bell*, 4 Cal. 333.

<sup>185</sup> *People v. Board of Supervisors of Alameda Co.*, 26 Cal. 641; see, also, *Supervisors v. United States*, 4 Wall. 435. When a petition for a peremptory mandate to the judge of a District Court, to enter the name of the petitioner as an attorney of record in a cause, will be denied, see *Herrington v. Sawyer*, 36 Cal. 289. For petition for *mandamus* to command city council to direct city treasurer to pay expenses incurred in the support of schools, see *State v. City of Cincinnati*, 19 Ohio, 178. Petition for *mandamus* to compel a county treasurer to pay a warrant previously issued by the county auditor. See *Jones v. Morgan*, 67 Cal. 308. Petition to compel auditor to allow claim of petitioner. See *Burke v. Edgar*, 67 Cal. 182. Answer supplying defects in petition. See *Williard v. Dillard*, 86 Cal. 154. The petition and affidavit for *mandamus* need not necessarily be separate papers. Since the petition must contain all the matters which would be set out in the affidavit, it is sufficient if the petition be sworn to. *Golden Canal Co. v. Bright*, 8 Col. 144. Requisites of petition for writ of *mandamus* against public officer, to compel him to perform a statutory duty. See *Schwanbeck v. People*, 15 Col. 64.

<sup>186</sup> *Parrish v. Reed*, 2 Wash. St. 491.

judge to decide, was not pending before him for decision.<sup>187</sup> *Mandamus* will not lie to compel action on the part of an inferior court until it is made clearly to appear that such inferior court has been regularly and properly moved to take the required action, and has unwarrantably refused to act.<sup>188</sup> It will not lie to compel a judge to settle a statement of facts, when he has not refused to do so, but has continued the matter until he could have an opportunity to examine the statement and the objections thereto.<sup>189</sup> Nor will it lie to compel the court to enter a *nunc pro tunc* order substituting one attorney for another in a pending action.<sup>190</sup> Nor to compel the board of school examiners of a county to issue a teacher's certificate to an applicant entitled thereto, a remedy in such case being provided by statute.<sup>191</sup> An order of a superior court refusing a writ of mandate is a final judgment, from which an appeal may be taken.<sup>192</sup>

<sup>187</sup> *State v. Judge of District Ct.*, 3 N. Dak. 43. Waiver of objections to alternative writ. *State v. Moss*, 13 Wash. St. 42.

<sup>188</sup> *State v. Hunter*, 4 Wash. St. 651.

<sup>189</sup> *State v. Superior Ct.*, 13 Wash. St. 514; see § 4897, *ante*.

<sup>190</sup> *State v. Langley*, 13 Wash. St. 636.

<sup>191</sup> *State v. Hitt*, 13 Wash. St. 547.

<sup>192</sup> *People v. Thompson*, 66 Cal. 398.

## CHAPTER IV.

### PROHIBITION.

§ 5442. **In general.** The writ of prohibition is the counterpart of the writ of mandate. It arrests the proceedings of any tribunal, corporation, board, or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.<sup>1</sup> At common law it was issued by a superior court, to the judge and parties to a suit in an inferior court, commanding them to cease from the prosecution of the same, upon a suggestion that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction but to the cognizance of some other court.<sup>2</sup> It may also be issued when, having jurisdiction, the court has attempted to proceed by rules differing from those which ought to be observed, or when by the exercise of its jurisdiction the inferior court would defeat a legal right.<sup>3</sup> It may be issued by any court except Police or Justices' Courts, to an inferior tribunal, or to a corporation, board, or person, in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon affidavit, on the application of the person beneficially interested.<sup>4</sup> The writ will lie to prevent the exercise of unauthorized power by an inferior tribunal, in cases where it has jurisdiction as well as where it has not.<sup>5</sup>

<sup>1</sup> Cal. Code Civ. Pro., § 1102; see *Maurer v. Mitchell*, 53 Cal. 289; *Havemeyer v. Superior Ct.*, 84 id. 327; *White v. Superior Ct.*, 110 id. 54.

<sup>2</sup> 3 Shars. Bl. Com. 112. Power to issue writ of prohibition. See *Rickey v. Superior Ct.*, 59 Cal. 661; *McInerney v. Denver*, 17 Col. 302; *Manufacturing Co. v. Pratt*, 20 Fla. 122; *Railroad Co. v. Commissioners*, 127 Mass. 58. A court having jurisdiction to issue the writ has no discretion to refuse it when demanded by the real party in interest in a proper case. *Havemeyer v. Superior Ct.*, 84 Cal. 327; 18 Am. St. Rep. 192.

<sup>3</sup> Buller N. P. 219; 2 Ch. Pr. 355.

<sup>4</sup> Cal. Code Civ. Pro., § 1103; see, also, *Sweet v. Hulbert*, 51 Barb. 312; *People v. Clute*, 42 How. Pr. 157.

<sup>5</sup> See *Quimbo Appo v. People*, 20 N. Y. 550.

But it must be an excess of jurisdiction in an absolute sense, and not an erroneous exercise of power.<sup>6</sup> The exercise of judicial and ministerial power must be distinguished. For an excess of the former the writ will lie, while for the latter it will not; as to restrain the issuing of an execution, or to restrain a ministerial officer from the execution, of process in his hands.<sup>7</sup>

Nor will this writ lie to bring under review the proceedings of an inferior tribunal merely upon the ground that they are erroneous;<sup>8</sup> nor where the tribunal has general jurisdiction of the cause will it lie to a mere point of practice;<sup>9</sup> nor to deprive a court of jurisdiction conferred by statute.<sup>10</sup> The writ of prohibition will not lie against the governor of a state to restrain him from granting a commission to a person claiming to be elected to a public office, for the reason that the judiciary has no power to invade the province of the executive, that being a distinct and independent department of the government.<sup>11</sup> The common-law rule that the writ will not issue to an inferior tribunal in a cause arising out of its jurisdiction until the want of jurisdiction has first been pleaded in the court below and the plea refused, is believed to be applicable in most, if not all, the states. So held in Arkansas.<sup>12</sup> The California Code of Civil Procedure, section 1103, would seem to require this in all cases, as well when there was claimed to be no jurisdiction in the lower court, as where it is proceeding in excess of its jurisdiction; for every intendment, not only as to the regularity of the proceedings of all courts, will be indulged, but especially will it be presumed that every court, when its intention is properly called to an act in excess of its jurisdiction, will, if it be possible, undo the un-

<sup>6</sup> *People v. Whitney*, 47 Cal. 584.

<sup>7</sup> *Ex parte Brandladet*, 2 Hill, 367; *People v. Supervisors of Queens Co.*, 1 id. 195, 201. The Legislature can not extend or enlarge the office of the writ of prohibition, so as to include ministerial functions. *Farmers', etc., Union v. Thresher*, 62 Cal. 402. Otherwise in Utah. *People v. Hiram House*, 4 Utah, 369.

<sup>8</sup> *Ex parte Gordon*, 2 Hill, 363; *People v. Marine Court*, 36 Barb. 341; S. O., 14 Abb. Pr. 266; S. O., 23 How. Pr. 446; *People v. Russell*, 19 Abb. Pr. 136; S. C., 29 How. Pr. 176.

<sup>9</sup> Id.

<sup>10</sup> *People v. N. Y. Com. Pleas*, 18 Abb. Pr. 438; 43 Barb. 278.

<sup>11</sup> *Greir v. Taylor*, 4 McCord, 206.

<sup>12</sup> *Ex parte McMeechen*, 12 Ark. 70; *Ex parte City of Little Rock*, 26 id. 52; see, also, *Havemeyer v. Superior Ct.*, 84 Cal. 327; 18 Am. St. Rep. 192; *Boughman v. Superior Ct.*, 72 Cal. 572; *Harris v. Brooker*, 8 Wash. St. 138.

authorized act; hence the superior courts will, in cases where the inferior court can recall the act or afford proper relief — unless a direct application has been made to the lower court for that purpose and it has been denied — hold that there is a plain, speedy, and adequate remedy without granting the writ. As where an injunction has been granted in direct violation of the statute, and without any jurisdiction on the part of the court, prohibition will not be granted to prevent the court from proceeding with the injunction where no application has been made to dissolve it.<sup>13</sup>

Prohibition may be granted on the application of either of the parties litigant in the inferior tribunal.<sup>14</sup> Independently of the statute, it would seem, both upon principle and authority, that no personal interest in the proceedings sought to be prohibited need be shown by the relator or petitioner to warrant the application, and the writ may be granted upon the application of a stranger to the record. The governing principle in such cases is, that by proceeding without or in excess of its jurisdiction, the court is chargeable with a contempt of the sovereign as well as a grievance to the party injured.<sup>15</sup> The California Code of Civil Procedure, section 1103, provides that the writ shall issue on the application of “the person beneficially interested.” Whether the word “person,” as here used, is restricted to the parties to the record has not, so far as we know, received judicial construction; but unquestionably a beneficial interest must be shown in the petitioner. Prohibition lies as well against a court of chancery as of law; and where such court has exceeded its powers in the appointment of a receiver, prohibition has been granted to restrain it from proceeding under the order of appointment.<sup>16</sup> It should clearly appear that the inferior tribunal is actually proceeding or about to proceed in some matter over which it has no rightful jurisdiction. The acts which show this must be set out in the application for the writ.<sup>17</sup>

<sup>13</sup> *Ex parte McMeechen*, 12 Ark. 70.

<sup>14</sup> *Clapham v. Wray*, 12 Mod. 423.

<sup>15</sup> See High's Extraordinary Legal Remedies, § 779, and cases cited. A writ of prohibition to prohibit the court from further proceeding in the matter of the removal of officers of a corporation may be brought in the name of the corporation. *Chollar Min. Co. v. Wilson*, 66 Cal. 374.

<sup>16</sup> *Ex parte Smith*, 23 Ala. 94.

<sup>17</sup> *Prignitz v. Fischer*, 4 Minn. 366. And it must appear from the petition for the writ that there is some threatened injury for which

It is, however, well settled that, in a proper case, the writ will lie even after verdict, sentence, or judgment. Where the court has proceeded thus far, prohibition will not lie for a want of jurisdiction not apparent upon the record; but if the want of jurisdiction clearly appear on the face of the record, it will.<sup>18</sup> The writ must be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed, and command such party to desist or refrain from further proceedings in the action or matter specified therein, until the further order of the court from which it is issued, and to show cause before such court, at a specified time and place, why such party should not be absolutely restrained from any further proceedings in such action or matter. The peremptory writ must be in a similar form, except the words requiring the party to show cause why he should not be absolutely restrained, etc., must be omitted, and a return day inserted.<sup>19</sup>

**§ 5443. Affidavit on application for writ.**

*Form No. 1209.*

[TITLE OF COURT TO WHICH THE APPLICATION IS MADE.]  
[VENUE.]

A. B., of ..... in the county of ....., being first duly sworn, says that, etc. [stating such facts as show the relator to be entitled to the writ and the relief demanded]. And that he makes this affidavit for the purpose of procuring a writ of prohibition to be issued out of this court to the said ..... and ....., to prohibit and restrain them and each of them from [stating the acts to be prohibited].

Wherefore he prays for the issuance of such writ, and for such other and further relief as he may be entitled to.

[JURAT.]

[SIGNATURE.]

the petitioner has no other adequate remedy. *Harris v. Brooker*, 8 Wash. St. 138. The writ will issue only when there is no plain, speedy and adequate remedy at law. *Ducheneau v. Ireland*, 5 Utah, 108; *People v. Hills*, Id. 410; *Agassiz v. Superior Ct.*, 90 Cal. 101; *McInerney v. City of Denver*, 17 Col. 302. It is never allowed to supersede the ordinary functions of an appeal or writ of error. Id.; *Powelson v. Lockwood*, 82 Cal. 613; *Walcott v. Wells*, 21 Nev. 47. 52; 37 Am. St. Rep. 478.

<sup>18</sup> See High's Extraordinary Legal Remedies, § 774, and notes.

<sup>19</sup> Cal. Code Civ. Pro., § 1104. The provisions of sections 1088 to 1097, inclusive, of the Code of Civil Procedure, apply to this proceeding as well as to the writ of mandate. Id., § 1105.



§ 5444. **Affidavit.** The affidavit should show that the affiant has either knowledge or information concerning the matters stated in it.<sup>20</sup> If the application is submitted on the affidavit and answer, and the answer denies the material allegations of the affidavit, the application will be dismissed.<sup>21</sup> As there is no cause in court until the writ is allowed, the affidavit should not be entitled in any cause.

§ 5445. **Notice of motion for writ.**

*Form No. 1210.*

[TITLE.]

To C. D.:

Please take notice that I will move the court at [etc.], on the ..... day of ....., 18.., at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order that a writ of prohibition issue directed to [name the court or tribunal], and to ....., the judge thereof, and ....., and commanding them to desist and refrain from any further proceedings in [state the suit or proceeding sought to be prohibited], or for such further or other relief as the court may see proper to grant; which motion will be based upon the affidavit of A..B. (and the record of said proceedings, designating all papers to be used), copies of which are herewith served.

Yours, etc.,

B. D., Attorney for A. B.<sup>22</sup>

[DATED, ETC.]

§ 5446. **Alternative writ of prohibition.**

*Form No. 1211.*

[TITLE.]

The people of the state of California, to the ..... court of ....., and to ....., greeting:

Whereas A. B., of ....., lately in our court at ....., on the ..... day of ....., 18.., represented to our

<sup>20</sup> *Carlaga v. Dryden*, 30 Cal. 244. If the proceeding in the lower court is not, on its face, in excess of jurisdiction, but is so in fact by reason of the existence of some matter not disclosed, such matter ought to be averred in some proper form, to make the want of jurisdiction appear. *Havemeyer v. Superior Ct.*, 84 Cal. 327; 18 Am. St. Rep. 192.

<sup>21</sup> *Carlaga v. Dryden*, 30 Cal. 244.

<sup>22</sup> When notice of the application is given. It must be at least ten days. Cal. Code Civ. Pro., § 1088; see, also, § 1005.

said court, that, etc. [stating the facts and proceedings complained of].

Nevertheless, you, the said court aforesaid, and the said ....., well knowing the premises, yet contriving as it is said, the said A. B. unjustly to aggrieve and oppress, have [stating grievances], in contempt of us, against the laws and customs of our said state, and to the manifest damage, prejudice, and grievance of him, the said A. B. Wherefore the said A. B. has prayed relief, and our writ of prohibition in that behalf.

We, therefore, being willing that the laws and customs of our said state should be observed, and that our citizens should in nowise be oppressed, do command you that you desist and refrain from any future proceedings in [stating the matter to be prohibited] until the ..... day of ....., 18.., and until the further order of this court thereon; and that you show cause before our said court, at the time last aforesaid, at the courtroom of this court, in ....., why you should not be absolutely restrained and prohibited from any further proceedings in such suit or matter. And have you then and there this writ.

Witness, ....., judge [or justice] of said court at ....., the ..... day of ....., 18..

[SEAL.]

M. W., Clerk.<sup>23</sup>

§ 5447. **Answer.** On the return of the alternative, or the day on which the application for the writ is noticed, the party on whom the writ or notice has been served may show cause by answer under oath, made in the same manner as an answer to a complaint in a civil action.<sup>24</sup> If an answer be made which raises a question as to a matter of fact essential to a determination of the motion, and affecting the substantial rights of the parties, and upon the supposed truth of which the application for the writ is based, the court may, in its discretion, order the question to be tried before a jury, and postpone the argument until such trial can be had, and the verdict certified to the court. The question to be tried must be distinctly stated in the order for trial, and the county must be designated in which the same shall be had. The order may also direct the jury to assess any

<sup>23</sup> In peremptory writ the clause relating to showing cause, etc., is omitted, and a return day inserted. Cal. Code Civ. Pro., § 1104.

<sup>24</sup> Cal. Code Civ. Pro., § 1089.

damages the applicant may have sustained, in case they find for him.<sup>25</sup>

§ 5448. **Demurrer.** The sufficiency of the answer is determined under the rules applicable to answers in general. A motion to strike out and disregard the answer as immaterial is in effect a general demurrer.<sup>26</sup> So is a motion that the writ issue notwithstanding the answer.<sup>27</sup>

§ 5449. **Default.** The writ can not be granted by default. The case must be heard by the court whether the adverse party appear or not.<sup>28</sup>

§ 5450. **Hearing and practice.** If no answer be made the case must be heard on the papers of the applicant. If the answer raises only questions of law, or puts in issue immaterial statements, not affecting the substantial rights of the parties, the court must proceed to hear or fix a day for hearing the argument of the case.<sup>29</sup> On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency, and may countervail it by proof either in direct denial, or by way of avoidance.<sup>30</sup> The practice is the same as in *mandamus*.<sup>31</sup>

§ 5451. **Punishment.** For a neglect or refusal to obey a peremptory writ of prohibition, the party may be punished by a fine not exceeding one thousand dollars, and for a persistent refusal may be imprisoned until the writ is obeyed.<sup>32</sup>

§ 5452. **Service of writ.** The writ may be served in the same manner as a summons in a civil action, except when otherwise expressly directed by the order of the court. Service upon a majority of the members of any board or body is service upon

<sup>25</sup> Cal. Code Civ. Pro., § 1090.

<sup>26</sup> Middleton v. Low, 30 Cal. 599.

<sup>27</sup> Ward v. Flood, 48 Cal. 46.

<sup>28</sup> Cal. Code Civ. Pro., § 1094.

<sup>29</sup> Id., § 1088; and see State, etc., v. Superior Ct., 14 Wash. St. 203.

<sup>30</sup> Cal. Code Civ. Pro., § 1091.

<sup>31</sup> See, generally, the preceding chapter on that subject, and Cal. Code Civ. Pro., §§ 1088 to 1105, inclusive; see, also, High's Extraordinary Legal Remedies, § 795 *et seq.*

<sup>32</sup> Cal. Code Civ. Pro., § 1097.

the board or body, whether at the time of the service the board or body was in session or not.<sup>33</sup>

§ 5452a. Granting or refusing writ—miscellaneous cases. A court that proceeds in the trial of a cause against the express prohibition of a statute is exceeding its jurisdiction, and may be restrained by writ of prohibition.<sup>34</sup> It will lie to restrain a judge from proceeding in an action in which he is disqualified by reason of interest, although the court over which he presides may have jurisdiction of the cause.<sup>35</sup> It will lie to prevent the Superior Court of one county from proceeding in an action against a corporation whose principal place of business is in another county, in which it was served with summons.<sup>36</sup> It will lie against a court which threatens to enforce by contempt proceedings the issuance of a county warrant in payment of a stenographer's fees which are not a proper county charge.<sup>37</sup> And it will lie in a proper case to prevent a superior court from setting aside a sale of real estate in the administration of a decedent's estate.<sup>38</sup> But it will not lie to arrest the proceedings of an inferior court in the administration of an estate, unless it clearly appears that such proceedings are without, or in excess of, the jurisdiction of such inferior court.<sup>39</sup> Prohibition will not lie to set aside acts already performed.<sup>40</sup> The writ does not run to a ministerial officer.<sup>41</sup> And a tax collector, being a ministerial officer, can not be restrained by prohibition from performing the duties of his office.<sup>42</sup> The writ will not lie to restrain a tax levy;<sup>43</sup> nor to prevent the usurpation of an office.<sup>44</sup> It will not lie to restrain a board of supervisors

<sup>33</sup> *Id.*, § 1096. Service of copy of the petition and writ. See *Havemeyer v. Superior Ct.*, 84 Cal. 327; 18 Am. St. Rep. 192.

<sup>34</sup> *Hayne v. Justices' Ct.*, 82 Cal. 284; 16 Am. St. Rep. 114.

<sup>35</sup> *Gold Mine Co. v. Keyser*, 58 Cal. 315.

<sup>36</sup> *Fresno Nat. Bank v. Superior Ct.*, 83 Cal. 491.

<sup>37</sup> *State v. Superior Ct.*, 4 Wash. St. 30; and see *People v. Carrington*, 5 Utah, 531; *Williams v. Dwinelle*, 51 Cal. 442.

<sup>38</sup> *State v. Superior Ct.*, 10 Wash. St. 168.

<sup>39</sup> *State v. Benton*, 12 Mont. 66.

<sup>40</sup> *Hall v. Superior Ct.*, 63 Cal. 179; *Havemeyer v. Superior Ct.*, 84 *id.* 327; 18 Am. St. Rep. 192; *Brooks v. Warren*, 5 Utah, 89.

<sup>41</sup> *Le Conte v. Town of Berkeley*, 57 Cal. 269.

<sup>42</sup> *Hobart v. Tillson*, 66 Cal. 210.

<sup>43</sup> *City of Coronado v. San Diego*, 97 Cal. 440.

<sup>44</sup> *Buckner v. Veuve*, 63 Cal. 304.

from fixing water rates.<sup>45</sup> It ought not to issue to restrain the progress of any legislation pending in a board authorized by the laws to legislate with respect to matters of public interest.<sup>46</sup> The writ will not lie to restrain courts having original jurisdiction of cases in equity from issuing injunctions in excess of their jurisdiction, when there is a complete remedy by appeal from any final judgment that may be rendered by such courts in such cases.<sup>47</sup> The fact that a writ of replevin issued by a justice of the peace is returnable on Sunday, or that the proceedings in such action involve the title to real estate, or that the plaintiffs therein and the officers making the levy were trespassers, are not grounds for the issue of a writ of prohibition to restrain such proceedings.<sup>48</sup>

§ 5452b. **Prohibition — rehearing.** A petition for a rehearing, and not a motion for a new trial, is the proper remedy for one desiring a rehearing of an original petition in the Supreme Court for a writ of prohibition, after a decision has been rendered thereupon.<sup>49</sup>

<sup>45</sup> *Spring Valley Water Works v. Bartlett*, 63 Cal. 245.

<sup>46</sup> *Spring Valley Water Works v. San Francisco*, 52 Cal. 111.

<sup>47</sup> *State v. Jones*, 2 Wash. St. 662; 26 Am. St. Rep. 897. Issue of the writ in insolvency proceedings. See *Hayne v. Justices' Court*, 82 Cal. 284; 16 Am. St. Rep. 114; *Goddard v. Superior Ct.*, 90 Cal. 364; *Haile v. Superior Ct.*, 78 id. 418. After the property of the insolvent has been sold by the assignee there is no office for the writ of prohibition to perform in reference thereto. *Chinette v. Conklin*, 105 Cal. 465.

<sup>48</sup> *Tapia v. Martinez*, 4 N. Mex. 165, but compare *People v. Splers*, 4 Utah, 385.

<sup>49</sup> *Grangers' Bank v. San Francisco*, 101 Cal. 198.

## CHAPTER V.

### EMINENT DOMAIN.

§ 5452c. **Power of, generally.** The power of eminent domain is one of the inalienable incidents of sovereignty, which may be exercised in favor of public uses over any and all property, private and even public.<sup>1</sup> But this power is to be exercised under and by virtue of the legislative will as expressed by the law-making power, and the right to exercise it must be given expressly or by necessary implication from power expressly given.<sup>2</sup> The determination as to whether or not the power shall be exercised, and as to what lands are necessary to be taken, is a political and legislative question, and not a judicial one. If the use is a public use, the power of the court is confined to seeing that the burdens cast upon the citizen are in conformity with the methods prescribed by the Legislature, and that those methods are not in conflict with the fundamental rights of the people.<sup>3</sup>

§ 5452d. **Nature of condemnation proceedings.** Condemnation proceedings are purely statutory and special in their character, and strict compliance with the requirements of the statute is essential.<sup>4</sup> The proceedings can be only instituted under the particular statutes which warrant them, and the right is limited to those who seek to take the property belonging to others.<sup>5</sup>

<sup>1</sup> See *Gilmer v. Lime Point*, 18 Cal. 229; *Moran v. Ross*, 79 id. 159; *Woodmere Cemetery v. Roulo*, 104 Mich. 595.

<sup>2</sup> *So. Pac. R. R. Co. v. Railway Co.*, 111 Cal. 221; *Boston, etc. R. R. Co. v. Railroad Co.*, 124 Mass. 368; *Barre R. R. Co. v. Railroad Co.*, 61 Vt. 1; 15 Am. St. Rep. 877.

<sup>3</sup> *Wulzen v. Board of Supervisors*, 101 Cal. 15; 40 Am. St. Rep. 17. As to the right of eminent domain in California, see Cal. Code Civ. Pro., §§ 1254, 1257, as amended by act of March 27, 1897. In whose behalf the right may be exercised. See Cal. Code Civ. Pro., § 1238, as amended by act of March 4, 1897.

<sup>4</sup> *Knoth v. Barclay*, 8 Col. 300; *Railroad Co. v. Allen*, 13 id. 229; *Lewis v. Railroad Co.*, 5 S. Dak. 148.

<sup>5</sup> *Colo., etc., R. R. Co. v. Ruedl*, 2 Col. App. 202; and see *Helser v. New York*, 104 N. Y. 68; *Railroad Co. v. Mattheis*, 35 Neb. 48.

§ 5452e. **Complaint or petition.** Condemnation proceedings under the South Dakota statute must be in writing, and made a matter of record. The jurisdiction of the judge to act must be affirmatively shown by a proper petition stating the jurisdictional facts.<sup>6</sup> The petition should show the value of the property sought to be taken or the amount involved in the proceeding.<sup>7</sup> So, the necessity of the use for which the condemnation is sought must be alleged.<sup>8</sup> But where the complaint contained no averment that the land in question had been appropriated to a public use, it was held sufficient on demurrer without alleging that the land was required for a more necessary public use.<sup>9</sup> In a proceeding to condemn a right of way for a railroad company, the complaint must contain a description of each piece of land sought to be taken, and whether the same includes the whole or only a part of an entire tract.<sup>10</sup> Extreme accuracy is required in the description of the property sought to be acquired, and there must be no uncertainty in such description or in the degree of interest sought to be acquired.<sup>11</sup>

§ 5452f. **Amendment of petition.** The court has full power to grant leave to amend a petition in condemnation proceedings whenever it shall be of the opinion that justice may require it.<sup>12</sup> And a petition which is insufficient by reason of a de-

<sup>6</sup> *Lewis v. Railway Co.*, 5 S. Dak. 148. Jurisdiction of Superior Court to entertain the proceeding. See *Bishop v. Superior Court*, 87 Cal. 226.

<sup>7</sup> *Railroad Co. v. Allen*, 13 Col. 229. See *San Diego Land Co. v. Neale*, 88 Cal. 50.

<sup>8</sup> *City of Helena v. Harvey*, 6 Mont. 114.

<sup>9</sup> *Lake Pleasanton Water Co. v. Water Co.*, 67 Cal. 659. Insufficiency of complaint in failing to show that the use for which condemnation is sought is a public use, and for uncertainty in not showing definitely what water rights are proposed to be condemned. See *Aliso Water Co. v. Baker*, 95 Cal. 268. Instances of sufficient averment of a public use. *Cummings v. Peters*, 56 Cal. 593; *Rialto Irrigation District v. Brandon*, 103 id. 384.

<sup>10</sup> *Cal. Cent. Railway Co. v. Hooper*, 76 Cal. 404. Sufficiency of complaint in action by "railroad committee" to secure rights of way. See *Judson v. Gage*, 91 Cal. 304. Sufficient allegation of termini of proposed railway. *Cal., etc., R. R. Co. v. So. Pac. Railway Co.*, 67 Cal. 59; *Bryan v. Moore*, 81 Ind. 13.

<sup>11</sup> *In re Railroad Co.*, 70 N. Y. 191; *Matter of Water Commrs.*, 96 id. 361; *Metrop., etc., Railway Co. v. Dominick*, 55 Hun, 198.

<sup>12</sup> *Contra Costa R. R. Co. v. Moss*, 23 Cal. 323.

fective jurisdictional averment, may be amended so that the court may have jurisdiction of the subject-matter thereafter.<sup>13</sup>

§ 5452g. **Verification.** The petition need not be verified when not so required by the statute. When the proceeding is brought in the name of a county, the answer need not be verified.<sup>14</sup>

§ 5452h. **Matters of practice — generally.** A proceeding for the condemnation of land is not commenced under the California statute until the issuance of summons.<sup>15</sup> In California, it is the duty of the owner of the land to allege and prove its value, and the burden of proof as to the value is upon him.<sup>16</sup> Under the Constitution and statutes of Washington, the petitioner in a proceeding to appropriate lands for right of way, has the right to open and close, both in the presentation of proof and the argument to the jury, as the burden rests upon him to show not only the necessity for the taking but the reasonable value of the land appropriated.<sup>17</sup> Under the Colorado statute, the question of necessity for taking the property for municipal purposes, is not for the jury to determine, but is wholly within the province of the municipal authorities.<sup>18</sup> The cause is heard upon the petition, no answer or reply thereto being necessary. The statute provides, however, for the filing of a cross-petition by any person interested in the property sought to be taken who has not been made a party to the action.<sup>19</sup> And in some jurisdictions objections to the condemnation may be interposed by any appropriate pleading.<sup>20</sup> The landowner is entitled to notice of the application to be made to the court to appropriate his land to public use, before judgment appropriating it can be entered.

<sup>13</sup> *Land Co. v. Ditch Co.*, 18 Col. 489.

<sup>14</sup> *Monterey County v. Cushing*, 83 Cal. 507.

<sup>15</sup> *Pac. Coast Railway Co. v. Porter*, 74 Cal. 281.

<sup>16</sup> *San Diego Land, etc., Co. v. Neale*, 88 Cal. 50; *Monterey Co. v. Cushing*, 83 id. 507; also, *Railroad Co. v. Allen*, 13 Col. 429.

<sup>17</sup> *Bellingham, etc., R. R. Co. v. Strand*, 4 Wash. St. 311; *Seattle, etc., R. R. Co. v. Gilchrist*, 4 id. 509. Otherwise in Colorado. *Railroad Co. v. Allen*, 13 Col. 229.

<sup>18</sup> *Warner v. Town of Gunnison*, 2 Col. App. 430.

<sup>19</sup> *Denver, etc., R. R. Co. v. Griffith*, 17 Col. 598.

<sup>20</sup> *St. Joseph, etc., R. R. Co. v. Railroad Co.*, 94 Mo. 535; *Matter of Lockport, etc., R. R. Co.*, 77 N. Y. 557; *Tracy v. Railroad Co.*, 80 Ky. 264.



And after such notice he has the right to contest the appropriation of his land to the petitioner's use.<sup>21</sup>

**§ 5452i. Joinder of proceedings.** Under the California statute (Code Civ. Pro., § 1244), a proceeding by a railroad corporation to acquire a right of way across the right of way of another railroad company, and a proceeding to acquire a right of way over lands which the defendant owns in fee, may be united.<sup>22</sup>

**§ 5452j. Viewing premises.** In the trial of a proceeding for the appropriation of lands, it is within the discretion of the trial court to permit the jury to view the premises.<sup>23</sup>

**§ 5452k. Conclusiveness of judgment.** Independent of statutory provisions, a judgment of a court of competent jurisdiction in condemnation proceedings is as conclusive upon the parties thereto as any other judgment.<sup>24</sup> The court having jurisdiction of the subject-matter and of the parties, the judgment is conclusive against collateral attack, although it may be erroneous on its merits, or irregular in its form.<sup>25</sup>

<sup>21</sup> *Baltimore, etc., R. R. Co. v. Pittsburg, etc., R. R. Co.*, 17 W. Va. 812; and see *Rockwell v. Nearing*, 35 N. Y. 306; *Langford v. Commissioners*, 16 Minn. 376; *Rutherford's Case*, 72 Penn. St. 82.

<sup>22</sup> *Cal., etc., R. R. Co. v. So. Pac. R. R. Co.*, 67 Cal. 59.

<sup>23</sup> *Bellingham Bay, etc., R. R. Co. v. Strand*, 4 Wash. St. 311; *Coughlen v. Railroad Co.*, 36 Kan. 422. In some jurisdictions it is by statute made the duty of the jury to view the premises, in which case the court has no discretion in the matter. See *Kankakee, etc., R. R. Co. v. Straut*, 102 Ill. 666; *Bridge Co. v. Comstock*, 36 W. Va. 263.

<sup>24</sup> *Baltimore, etc., R. R. Co. v. Railroad Co.*, 17 W. Va. 812; *Muhle v. Railroad Co.*, 86 Tex. 459; *Railroad Co. v. Forney*, 35 Neb. 607.

<sup>25</sup> *Burke v. City of Kansas*, 118 Mo. 309.

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